

ASTOR'S
INSOLVENCY AT LLOYD'S
AND EQUITAS RE

Also by the Author:-

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Astor's Equitas Re Handbook (2002)

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ASTOR'S
INSOLVENCY
AT LLOYD'S
AND EQUITAS RE

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To
G. A. L.

It was said, that the gold which he paid to the traders with whom he dealt, always looked remarkably bright, but invariably turned into pieces of slate and stone in the course of four-and-twenty hours.

Charles Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* (Richard Bentley, London, 1852),
Ch. *The Alchemists*

I think they acted upon the notion that anything that appeared to be connected with Lloyd's must be all right and therefore there was no reason to be suspicious of the transaction.

Wassermann v Dare [1925] 21 Ll.L.Rep. 25, 29 (Greer J)

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<i>Insurance Company v Lloyd's Syndicate</i> [1995] 1 Lloyd's Rep. 272.....	2.76
<i>International Insurance Co. v Certain Underwriters at Lloyd's London</i> , US Dist. LEXIS 19608.....	2.13
<i>Jaglom v Excess Insurance Co. Ltd.</i> [1971] 2 Lloyd's Rep. 171	2.66
<i>Johnson and another v Lloyd's</i> [2002] All ER (D) 315 (Jul).....	A5
<i>Johnston v Leslie & Godwin Financial Services Ltd.</i> [1995] LRLR 472	2.4
<i>Jones v Lloyds Standen v Lloyd's, The Times</i> , 2 February 2000, 16 December 1999	A6
<i>Judd v Merrett</i> [1997] LRLR 21	A23

<i>K. Bell & Associates, Inc. v Lloyd's Underwriters</i> , 97-7397 2d Cir. 1997 U.S. App. LEXIS 31872	2.13
<i>Kingscroft Insurance Co. Ltd. v Nissan Fire & Marine Insurance Co. Ltd. (No. 2)</i> [1999] Lloyd's Rep. IR 603	2.76
<i>Landoil Resources Corp. v. Alexander & Alexander Servs.</i> , 77 N.Y.2d 28	2.14
<i>Lark v Outhwaite</i> [1991] LRLR 1	A22
<i>Laws v Lloyd's</i> (December 19, 2003)	2.105
<i>Levenson v Motor Union Orion Ins. Co.</i> , 176 So. 2d 125	2.13
<i>Liberty Transp., Inc. v. Harry W. Gorst Co.</i> 229 Cal. App. 3d 417; 280 Cal.Rptr. 159	2.66, 4.7
<i>Lloyds of London, as subrogee of William G. Cirincione and the Yacht "Tropic Lightning" v Cozy Cove Yacht Sales, Inc., Blackfin Yacht Corp.</i> , 48 F.3d 535 (11th Cir. 1995)	2.13
<i>Lloyd's v Bowman</i> [2003] EWCA Civ 1886, [2003] All ER (D) 393 (Dec)	2.105, 2.132
<i>Lloyd's v Burningham</i> (4 March 1998; unreported)	A6
<i>Lloyd's v Canadian Imperial Bank of Commerce</i> [1993] 2 Lloyd's Rep. 579	A22
<i>Lloyd's v Clementson</i> [1995] LRLR 307	2.13, 4.56, 4.75, A23
<i>Lloyd's v Clementson</i> {1a} [1995] LRLR 307	2.13, 2.105, 4.56, 4.70, 4.90
<i>Lloyd's v Clementson</i> {1b} [1995] LRLR 307	2.13, 2.105, 4.8, 4.56
<i>Lloyd's v Clementson</i> {2a} [1997] LRLR 175	2.13, 2.66, 2.105, 4.8, 4.56, 4.57, 4.70, 4.75, 4.90, A14, A23
<i>Lloyd's v Cook</i> (16 September 1999; unreported)	2.132
<i>Lloyd's v Fraser</i> [1999] Lloyd's Rep IR 156	2.132, 2.133, A6, A7
<i>Lloyd's v Harper</i> (1880) 16 Ch. D. 290	2.9, 2.34, 2.50
<i>Lloyd's v Jaffray</i> [1999] 1 All ER (Comm) 354	A6
<i>Lloyd's v Jaffray</i> [2001] EWCA Civ 1503	A6
<i>Lloyd's v Jaffray</i> {1a} [1999] Lloyd's Rep. IR 182	2.16, 2.133
<i>Lloyd's v Jaffray</i> {2a} [2000] CLC 725	P12, 1.1, 1.3, 1.38, 2.34, 2.38, 2.89, 2.101, 2.104, 2.105, 4.56, A5, A22
<i>Lloyd's v Jaffray</i> {2b} [2002] EWCA Civ. 1101	P12, 1.1, 1.3, 2.34, 2.38, 2.89, 2.105, 4.56, A5, A7, A22
<i>Lloyd's v Leighs</i> {1a} [1997] CLC 759	2.133
<i>Lloyd's v Leighs</i> {1b & 2b} [1997] CLC 1398	2.13, 2.16, 2.63, 2.133, 4.56, 4.70, 4.95, 4.98
<i>Lloyd's v Leighs</i> {2a} [1997] CLC 1012	2.133
<i>Lloyd's v Lyon et al., The Times</i> , 11 August 1997	A6
<i>Lloyd's v Morris</i> [1993] LRLR 217	A22
<i>Lloyd's v Noel</i> [2001] EWCA Civ 521	A6
<i>Lloyd's v Noel</i> [2002] EWCA Civ 937	A5
<i>Lloyd's v Tropp</i> [2004] EWHC 33 (Comm)	2.13
<i>Lloyd's v Waters</i> [2001] BPIR 698	2.132, A6
<i>Lloyd's v White and others, The Times</i> , 14 April 2000, 144 SJ LB 190	A6
<i>Lloyd's v Wilkinson (No. 2)</i> (April 23, 1997; unreported)	A6, A7
<i>Logistic Resources Ltd. v Eastgate Group Ltd.</i> [2002] EWHC 1229 (Comm)	A5
<i>Lowell v. Brown</i> , 280 F. 1933 (1922)	2.104

<i>Lowsley-Williams v North River Ins. Co.</i> , 884 F. Supp. 166.....	2.13
<i>Luce v Lloyd's of London</i> 868 F Supp 625, 627 (D Vt. 1994).....	2.13, 2.66, 4.7
<i>Mander and others v Equitas Ltd.</i> [2000] Lloyd's Rep IR 520	A6, A9
<i>Manning v Lloyd's Lloyd's v Colfox and others Philips v Lloyd's</i> [1998] Lloyd's Rep IR 186.....	A6
<i>Marchant & Eliot Underwriting Ltd. v Higgins</i> [1996] 1 Lloyd's Rep 313.....	A18, A23
<i>Marchant & Eliot Underwriting Ltd. v Higgins</i> [1996] 2 Lloyd's Rep 31.....	A18, A23
<i>McAleer v John Does 1-10</i> , LEXIS 350	2.14, 2.16, 2.17
<i>McAleer v Smith</i> C.A. No. 88-0544L 791 F. Supp. 923, 932	2.13, 2.16
<i>McAllister v Lloyd's</i> [1999] Lloyd's Rep. IR 487.....	2.16, 2.132, A19
<i>McBride v Blackburn (Inspector of Taxes)</i> [2003] STC (SCD) 139	A5
<i>McMahon and Smith v AGF Holdings (UK) Ltd.</i> [1997] LRLR 159.....	2.107
<i>Medical Defence Union Ltd. v Department of Trade</i> [1979] 1 Lloyd's Rep. 499	4.59
<i>Mopaz Diamonds, Inc. v Institute Of London Underwriters</i> 822 F. Supp. 1053	2.13
<i>Moran v Lloyd's</i> [1981] 1 Lloyd's Rep. 423	1.1
<i>Napier & Ettrick v Hunter</i> [1993] AC 713.....	A22
<i>Napier & Ettrick v R. F. Kershaw Ltd.</i> [1993] 1 Lloyd's Rep. 10.....	A22
<i>Napier and Ettrick v R. F. Kershaw Ltd.</i> {1c and 2c}; <i>Lloyd's v Woodard and Wilson</i> [1997] LRLR 1; [1999] 1 WLR 756 (HL)	2.13, 2.76, 4.11, 4.13, 4.94
<i>Napier and Ettrick v R. F. Kershaw Ltd.</i> {1b and 2b} [1997] LRLR 1	4.11
<i>National Bank of Greece v Outhwaite</i> [2001] Lloyd's Rep IR 652.....	A21-A22
<i>Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow and Ernst & Young</i> [1997] LRLR 678	1.38
<i>New Cap Reinsurance Corporation Ltd. v HIH Casualty & General Insurance Ltd.</i> (February 20, 2002; unreported)	3.16
<i>North & South Insurance Corporation Ltd.</i> (1934) 47 Ll.L.R. 356	2.104
<i>North and South Trust Company v Berkeley</i> [1971] 1 WLR 471	2.4
<i>North Atlantic Insurance Co. Ltd. v Nationwide General Insurance Co. Ltd.</i> [2004] EWCA Civ 423.....	2.76
<i>P&B Run-Off Ltd. v Woolley</i> [2001] 1 All ER (Comm) 1120; [2002] Lloyd's Rep. IR 344	2.106
<i>P&B Run-Off Ltd. v Woolley</i> [2002] EWCA Civ. 65	2.106
<i>PCW Syndicates v PCW Reinsurers</i> [1995] LRLR 373.....	A23
<i>Philips v Lloyd's</i> [1998] Lloyd's Rep. IR 186	A6
<i>Pickett v Lloyd's & Peerless Ins. Agency</i> A-22, 131 N.J 457, 462; 621 A.2d 445.....	2.13
<i>Portavon Cinema Co Ltd v Price and Century Insurance Co. Ltd.</i> [1939] 4 All ER 601	2.35, 2.39, 2.76, 4.7
<i>Price and Price v Lloyd's</i> [2000] Lloyd's Rep IR 453	1.39, 1.41, A6, A18
<i>R v Committee of Lloyd's, ex p. Posgate The Times</i> , January 12, 1983	2.18, 2.21
<i>R v Lloyd's ex parte Briggs</i> {1a} [1992] COD 456.....	1.1, 2.13, 2.34, 2.103
<i>R v Lloyd's ex parte Briggs</i> {2a} [1993] 1 Lloyd's Rep. 176	1.1, 2.13, 2.18, 2.21, 2.34, 2.103, 2.105, 4.56, A22
<i>R v Lloyd's ex parte Johnson</i> (August 16, 1996; unreported).....	4.70, 4.95
<i>R v Mayor [etc.] of Colchester</i> 2 Dougl. El. Cas. 59	2.10
<i>Re a debtor</i> (No 140 IO of 1995) [1996] 2 BCLC 429	2.132

<i>Re a debtor</i> (No 544/SD/98) [2000] 1 BCLC 103	2.132, A6
<i>Re Axia Equity & Law Life Assurance Society plc</i> [2001] 1 All ER (Comm) 1010	3.27
<i>Re Capital Annuities Ltd.</i> [1979] 1 WLR 179	2.164
<i>Re Cosslett (Contractors) Ltd.</i> [2004] All ER (D) 241 (Mar).....	2.121
<i>Re Drax Holdings Ltd; Re InPower Ltd.</i> [2003] EWHC 2743	2.149, 2.154
<i>Re English and American Insurance Co. Ltd.</i> [1994] 1 BCLC 649	2.144
<i>Re Equitable Life Assurance Society</i> (November 26, 2001; unreported)	3.27
<i>Re Hawk Insurance Company Ltd.</i> [2001] 2 BCLC 480.....	3.27
<i>Re Micklethwaite</i> [2002] EWHC 1123	2.132
<i>Re NRG Victory Reinsurance Ltd.</i> [1995] 1 WLR 239	3.1
<i>Re Osiris Insurance Ltd.</i> [1999] 1 BCLC 182	3.27
<i>Re Paramount Airways Ltd.</i> [1993] Ch. 223	2.154
<i>Re Sheffield and South Yorkshire Permanent Building Society</i> (1889) 22 Q.B.D. 470	2.11
<i>Re Yorke (deceased); Stone and another v Chataway</i> [1997] 4 All ER 907	2.114, A6
<i>Richards v Lloyd's</i> , 135 F.3d 1289.....	2.13
<i>Roby v Lloyd's</i> , 996 F.2d 1353 (2d Cir. 1993), <i>cert. denied</i> , 114 S. Ct. 385 (1993).....	2.13, 2.66, 4.7
<i>Rozanes v Bowen</i> (1928) 32 Lloyd's List Law Reports 98.....	2.13, 2.35, 2.39
<i>Salomon v A. Salomon & Co. Ltd., Broderip v Salomon</i> LR [1897] A.C. 22	2.11
<i>Save Mart Supermarkets v Underwriters at Lloyd's London</i> , 843 F. Supp. 597	2.13
<i>Scott v Tuff-Kote (Australia) Pty. Ltd.</i> [1976] 2 Lloyd's Rep. 103	2.13, 2.18, 2.21
<i>Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.</i> [1995] 2 Lloyd's Rep. 197	A23
<i>Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.</i> [1995] LRLR 20.....	A23
<i>Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.</i> [1996] 1 AC 102.....	A23
<i>Shell v R. W. Sturge Ltd.</i> 850 F. Supp. 620.....	2.13
<i>Shell v R.W. Sturge, Ltd.</i> 55 F.3d 1227 (6th Cir. 1995).....	2.13
<i>Smith v Lloyd's of London</i> 568 F.2d 1115 (5th Cir. 1978)	2.13
<i>Sovereign Life Assurance Co. v Dodd</i> [1982] 2 QB 573.....	2.148
<i>Sphere Drake Insurance Ltd. v Euro International Underwriting Ltd.</i> [2003] EWHC 1636 (Comm), [2003] All ER (D) 160 (Jul).....	P12
<i>State Dept. of Ins. v Arthur J. Gallagher & Co.</i> , 622 So. 2d 370	2.11
<i>Sword-Daniels v Pitel</i> [1994] LRLR 10	A23
<i>Sword-Daniels v Pitel</i> [1995] 2 Lloyd's Rep. 513	1.38, 2.106, 2.107, 2.109
<i>Tamlin v Hannaford</i> [1950] 1 K.B. 18	2.11
<i>The Designer Room Ltd.</i> [2004] All Er (D) 411 (Mar)	2.121
<i>The Merak; T. B. & S. Batchelor & Co., Ltd. (Owners of Cargo on The Merak) v Owners of S. S. Merak</i> [1964] 2 Lloyd's Rep. 283	2.123
<i>The Zephyr</i> [1984] 1 Lloyd's Rep. 58	2.76
<i>Thicknesse v Lancaster Canal Co.</i> 4 M&W 472	2.10
<i>Thompson v Adams</i> (1889) 23 Q.B.D. 361	2.18, 2.21
<i>Thornton Springer v NEM Insurance Co. Ltd.</i> [2000] 2 All ER 489.....	A6, A7
<i>Tonicstar Ltd. v American Home Assurance Co.</i> [2004] All ER (D) 400 (May).....	P5
<i>Touche Ross & Co. v Baker</i> [1992] 2 Lloyd's Rep. 207.....	2.76
<i>Transit Casualty v Policyholders Protection Board</i> [1992] 2 Lloyd's Rep. 358	2.160, 4.8

<i>Travelers Indemnity Co. v Booker</i> , 657 F Supp. 280 (DDC 1987)	2.13, 2.66, 4.7
<i>Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.</i> [1998] 2 Lloyd's Rep 439	A6
<i>Underwriters at LaConcorde v Airtech Services</i> , 493 So. 2d 428.....	2.13
<i>Unisys Corporation v Insurance Company of North America</i> , Docket No. L-1434- 94-S, <i>Uniroyal Inc. v American Re-Insurance Co.</i> , Docket No. L-8172-94	A6, A15
<i>Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.</i> [1949] 2 KB 528	2.106
<i>Watts v Bucknall</i> [1903] 1 Ch. 766.....	2.89
<i>Wenlock v River Dee Co.</i> (1885) 10 App. Cas. 354.....	2.12
<i>West Shell Jr. v R.W. Sturge Ltd.</i> 1995 Fed. App. 0176P	2.30
<i>Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc</i> [1996] LRLR 310	2.108, 2.109, A6

MASTER GLOSSARY v. 3.0 (MAY 1, 2004)

The Master Glossary defines terms used in *Astor's Equitas Re Handbook*, *Astor's Insolvency at Lloyd's and Equitas Re*, *Astor's Law of Lloyd's*, 2nd Ed., and the Author's other relevant publications and presentations. In relation to a particular document, the Master Glossary is definitive on the version cited. The reader should ensure that he uses the most recent version of the Master Glossary. Updated versions are posted periodically at www.astorlaw.com/glossary. The following terms have the following meanings unless the context otherwise requires. Relevant measures often contain their own definitions. A term in **bold** has its own glossary entry. Some terms coined by the Author or not generally used elsewhere are underlined.

A

ABI — Association of British Insurers

ABI General Code — *Statement of General Insurance Practice* (**ABI**, January 1986)

ABI Intermediaries Code — Code of Practice for all Intermediaries (Including Employees of Insurance Companies) other than Registered Insurance Brokers (**ABI**, November 1988)

ABI Long-term Code — Statement of Long-Term Insurance Practice (**ABI**, August 1992)

Accelerated Reporting — Consultative document on accelerated reporting (Lloyd's, September 1994)

Accepting Name — a **Member** who entered into **RRC 1**. See **SOD**

Accountants Duty 1998 — *The Duty of Recognised Accountants to Report to Lloyd's* (Auditing Practices Board Bulletin, 1998/4, April 1998)

Action Group Settlement Agreement — see **RRC 3**

active underwriter — includes (where appropriate) deputy and assistant active underwriters

actual SPIL — a particular **SYA** stamp's actual **SPIL**. Cf. **authorised SPIL**

Actuary Work 1998 — *Using the Work of an Actuary with regard to Insurance Technical Provisions* — Bulletin 1998/2 (Auditing Practices Board, January 1998)

Additional Securities — Additional Securities Limited. Incorporated in England & Wales, number 00325101; wholly owned by the **Corporation**

administrative receivership — Insolvency Act 1986, Part III administrative receivership

agglomerate — to mingle in a single bank account the **PU** funds of participants in one particular **SYA**, and or the **PU** funds of participants on **YAs** of a particular **syndicate**; cf. **aggregate**, **collectivise**, **consolidate**, **intermingle**

aggregate — to compile into a single set of reporting data the relevant financial affairs of separate, otherwise unconnected individuals; cf. **agglomerate**, **collectivise**, **consolidate**

AGM — annual general meeting (of a company or the **Corporation**)

AIIB — Association of Insurance Intermediaries and Brokers

annual subscriber — a type of **Corporation** affiliate, such as **associate**, **Member**, and **substitute**

Antitrust White Paper 1999 — White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty — Commission programme No. 99/027 (European Commission, April 28, 1999). See **Article 81** and **Article 82**

APH — asbestos, pollution and health hazard

Article 81 — **EEC Treaty**, Art. 81 (formerly — viz., before the entry into force, on May 1, 1999, of the Amsterdam Treaty — *ibid.*, **Article 85**)

Article 82 — **EEC Treaty**, Art. 82 (formerly *ibid.*, **Article 86**)

Article 85 — *see* **Article 81**

Article 86 — *see* **Article 82**

Asbestos Documentation Requirements 1 — *London Market Insurers' Documentation Requirements For Asbestos Bodily Injury Claims* (Pi-688420 V1 0602485-0921; effective June 1, 2001 (Equitas Re, 2001); colloquially "DRs". *See* **Inward Reinsurance Documentation Requirements 1**

associate — a type of Corporation affiliate, like **annual subscriber**, **Member**, and **substitute**

assured-at-Lloyd's — a person insured by a **SYA participant**; includes, where the context requires, a **SYA participant** insured by himself or another SYA participant. *See* similarly **EquitasRe-assured-at-Lloyd's**. *Cf.* "policyholder"

Astor's Law of Lloyd's, 2nd. ed. — includes updates and (where appropriate) subsequent editions

at Lloyd's — actually or notionally at or in connection with the **Lloyd's enterprise**, the **Corporation** or the premises of **Lloyd's**. *Cf.* **Lloyd's**

AUA 1 — Additional Underwriting Agencies (Management) Ltd. Incorporated in England and Wales, August 23, 1979, number 1445421; wholly owned by the **Corporation**

AUA 2 — Additional Underwriting Agencies (No. 2) Ltd. Incorporated in England and Wales, October 15, 1979, number 1454055; wholly owned by the **Corporation**

AUA 3 — Additional Underwriting Agencies (No. 3) Ltd. Incorporated in England and Wales, February 28, 1977, number 1300556; wholly owned by the **Corporation**

AUA 4 — *see* **SUM**

AUA 5 — Additional Underwriting Agencies (No. 5) Ltd. Incorporated in England and Wales, January 28, 1987, number 2094082; wholly owned by the **Corporation**

AUA 6 — Additional Underwriting Agencies (No. 6) Ltd. Incorporated in England and Wales, January 29, 1986, number 1983478; dissolved February 22, 2000; was wholly owned by the **Corporation**

AUA 7 — Additional Underwriting Agencies (No. 7) Ltd. Incorporated in England and Wales, June 4, 1987, number 2137338; dissolved March 31, 1998; was wholly owned by the **Corporation**

AUA 8 — *see* **LMAS**

AUA 9 — Additional Underwriting Agencies (No. 9) Ltd. Incorporated in England and Wales, November 29, 1991, number 2666937; wholly owned by the **Corporation**

AUA 10 — Additional Underwriting Agencies (No. 10) Ltd. Incorporated in England and Wales, November 29, 1991, number 2666936; wholly owned by the **Corporation**

AUA 11 — Additional Underwriting Agencies (No. 11) Ltd.

audit window — the period between the end of an audited entity's financial period and the date of publication of the results of that period

Auditors Guidance — *Instructions for the guidance of Lloyd's auditors* (Lloyd's, annually)

Auditors: New Approach — *Lloyd's relationship with auditors — a new approach to audit and reporting arrangements at Lloyd's — Consultative Document* (Lloyd's, March 1997)

authorised SPIL — a particular SYA's potential maximum **SPIL**. *Cf.* **actual SPIL**

AV — aviation

AWP — Asbestos Working Party

B

Back-Office Authority — as appropriate, relevant rules (including those of a contractual nature), directions, customs, usages, guidance, policy, habits, wishes, whims and other material, whether or not lawful, purporting to regulate or direct practice at Lloyd's, generated at Lloyd's or in the London insurance market. Includes where appropriate the **Rulebook-at-Lloyd's**. *Cf.* (for example) (1) law; (2) extra-legal guidance of external insurance regulators; (3) uniquely customised provisions (if any) in a particular insurance contract made at Lloyd's; (4) practice

Barber TG — *Lloyd's Consultative Document — Underwriting Agency Agreement (Task Group 5)* (Lloyd's, July 1984)

BBSN circumstances, state — peculiarly at Lloyd's: (1) the **Lloyd's enterprise** conducts and is regulatorily permitted to conduct **business** as usual, including (for example) by **SYA stamps** selling insurance **at Lloyd's** in return for premium income, the **Central Fund** and various particular claims payment securitisation trust and other funds continuing to exist and be available to pay claims, and the Lloyd's enterprise otherwise conducting itself and being regulatorily permitted to conduct itself as a going concern; and (2) the Lloyd's enterprise publishes **blandishments** representing a certain minimum current and future quality of securitisation ("chain of security", "Security at Lloyd's", etc.); and (3) the Lloyd's enterprise is self-averredly, self-regulatorily and external-regulatorily solvent; and (4) **no** statutory, judicial or other due process has abrogated the **Golden Rule** in relation to every insurance contractual liability incurred at Lloyd's

bespoke — relating to **PIL** deployed on one or more **SYAs** by the **Member** other than through a **MAPA**

Bn. — (1) a written communication from self-regulators-at-Lloyd's to Market practitioners; (2) a **Mkt. Bn.** or **Reg. Bn.**

bn. — one thousand million

binder — binding authority

BO — the back office **at Lloyd's**; that part of the **Lloyd's enterprise** generally invisible and or inaccessible to the **assured-at-Lloyd's**; matters arising, and the environment, as between the **Member** or **SYA participant** and relevant components of the Lloyd's enterprise rather than directly with the assured-at-Lloyd's; *cf.* **FO, MO**. *See* **FO-MO-BO**.TM *And see* **SYA-level impenetrability rule**

Brokers Directive — Council Directive 77/92/EEC (December 13, 1976) on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities

bud — *v.t.*: in the context of a **syndicate**, to emit a new **YA** in a particular **UY**

Business Plan 1 — *Planning for profit: a business plan for Lloyd's of London* (Lloyd's, April 1993)

Business Plan 2 — *Business plan progress report* (Lloyd's, May 1994)

Business Plan 6 — *Business plan progress report* (Lloyd's, April 1996; Published in *One Lime Street*, April 1996)

byelaw — *see* **Byelaw**

Byelaw — a byelaw made by the **Council** under Lloyd's Act 1982, s.6(2)

C

CA — Court of Appeal (England)

calendar year — January 1 to December 31. *Cf.* **UY**

Canadian Combined-Use TD 1999 — the November 9, 1977 deed between *inter alia* Royal Trust Corporation of Canada and the **Corporation** amended March 8, 1978, amended and restated June 11, 1989 and September 26, 1995, and as may be further amended from time to time. *See* **Canadian Combined-Use TF 1999**

Canadian Combined-Use TF 1999 — funds held under the terms of the **Canadian Combined-Use TD 1999**

capacity — *see* **SPIL**

Captives Guidance Notes 1999 — *Guidance notes for applicants establishing a captive syndicate [and] establishing a captive corporate member, November 1998* (Lloyd's, February 1999). *See* **Captives Guide**

Captives Guide — *Captives* (Lloyd's, undated; attached to Mkt. Bn. Y1091, February 15, 1999 ("Lloyd's captives")). See **Captives Guidance Notes 1999**

Case — a disciplinary case at Lloyd's at Disciplinary Committee and or Appeal Tribunal level

cash call — either an open-YA-stamp cash call or a closing-YA-stamp cash call

CAT — catastrophe

Central Fund — as appropriate, the Lloyd's enterprise's Old Central Fund and or New Central Fund

Central Fund US TD 1 — see **CFUS 1 TD**

Central Fund US TD 2 — see **CFUS 2 TD**

Centrewrite — Centrewrite Limited. Incorporated in England and Wales, October 24, 1990, number 2551468; wholly owned by the **Corporation**

CFUS 1 — the fund set up under **CFUS 1 TD**

CFUS 1 TD — Lloyd's Central Fund United States Trust Deed, July 17, 1992 as amended and restated September 15, 1995. Usually at **Lloyd's "CFUS 1"**

CFUS 2 — the fund set up under **CFUS 2 TD**

CFUS 2 TD — Lloyd's Central Fund United States Trust Deed (Number 2), June 14, 1995 as amended and restated September 15, 1995. Usually at **Lloyd's "CFUS 2"**

Chain of Security 2000 — *Chain of Security 2000* (Lloyd's, 2000)

Chain of Security 2002 — *Lloyd's chain of security 2002* (Lloyd's, undated, pdf)

Chain of Security (RA 2001) 2002 — *Security underlying policies issued at Lloyd's* — at Corporation RA fye December 31, 2001, pp.36-38 (Lloyd's, May 2002)

Chain of Security 2003 — *Lloyd's chain of security 2003* (Lloyd's, undated, pdf)

Chain of Security 2003 US — *Lloyd's chain of security 2003* (teal-coloured first page) (Lloyd's, undated, pdf)

Chain of Security (RA 2002) 2003 — *Security underlying policies issued at Lloyd's*, at Corporation RA fye December 31, 2002, p.47-51

Chairman of Lloyd's — the Lloyd's Act 1982, s.4 officer of that title. See **Chairs, Deputy Chairmen of Lloyd's, self-regulators at Lloyd's**

Chairs — the Lloyd's Act 1982, s.4 Chairman of Lloyd's and *ibid.*, s.4 Deputy Chairmen of Lloyd's. See **self-regulators-at-Lloyd's**

CIPA — "coverage in place" agreement

Claims Scheme 1994 — *Lloyd's 1994 Claims Scheme* (Lloyd's, July 1, 1994; see also Byelaw 4 of 1994). Superseded by **Claims Scheme 1999**

Claims Scheme 1999 — *Lloyd's 1999 Claims Scheme* (Lloyd's, 1999)

claimium — money paid out to the assured-at-Lloyd's in satisfaction of the latter's relevant insurance contractual rights. Includes where appropriate *ex gratia* and without-prejudice payments. Does not include return premium

closing-YA cash call — a cash call made on the participants of a **SYA** as part of the exercise of closing the **YA** by outward **RTC**. Cf. **open-YA-stamp cash call**

Co-Insurance Directive — Council Directive 78/473/EEC (May 30, 1978) on the coordination of laws, regulations and administrative provisions relating to Community co-insurance

Code: Advertising — *Code for Underwriting Agents: Advertising and Publications* (Lloyd's, October 1998; attached to Reg. Bn. 97/98, October 15, 1998 ("Code for underwriting agents: advertising and publications"))

Code: Complaints — *Code for Underwriting Agents — UK Personal Lines Claims and Complaints Handling* (Lloyd's, 1997)

Code: Direct Policies — *Code of recommended practice for direct insurance documentation signed through LPSO* (NMA, 1990; attached to December 21, 1990 letter from the NMA's then Chairman, reproduced at NMA Red Book, vol. 1, p.M17 (April 1992))

Code: Investment Risk — *Investment Risk Code* (Lloyd's, December 1, 1997; attached to Reg. Bn. 111/97, December 1, 1997)

Code: Lloyd's Brokers — *Code of Practice for Lloyd's Brokers* (Lloyd's, July 6, 1988)

Code: Managing Reserving Risk (managing agencies) — *Code for Managing Agents: Management of Reserving Risk* (Lloyd's, October 1998; attached to Reg. Bn. 101/98, October 29, 1998, ("Code for managing agents: management of reserving risk"))

Code: Managing Underwriting Risk Supplement — *Suggested Supplement to Code for Managing Agents: Managing Underwriting Risk* (Lloyd's, 1998; attached to Reg. Bn. 107/98, November 5, 1998 ("Underwriting controls"))

Code: Members' Agency's Responsibilities — *Code for Members' Agents: Responsibilities to Members* (Lloyd's, August 1999; attached to Reg. Bn. 73/99, August 23, 1999 ("Byelaw review"))

Code: Multiple Syndicates — *Code of Practice for Underwriting Agents and Active Underwriters: Multiple Syndicates* (approved by the Council on December 9, 1985) (Lloyd's, December 1985)

Code: Reporting to Members — *Code of Practice for Members' Agents: Reporting to Names by Members' Agents* (approved by the Council on November 7, 1990) (Lloyd's, November 1990)

Code: Responsibilities — *Code for members' agents: responsibilities to members* (Lloyd's, 1999)

Code: UK Personal Lines — *Code for managing agents: UK personal lines, February 3, 1999* (Lloyd's, February 1999; attached to Reg. Bn. 5/99, February 8, 1999 ("Code for managing agents: UK personal lines"))

Code: UK Personal Lines Claims — *Code for Underwriting Agents: UK Personal Lines Claims and Complaints Handling* (Lloyd's, 1997)

Codes: Introduction — *Introduction to Lloyd's Codes of Practice for Underwriting Agents and Active Underwriters* (approved by the Council on December 9, 1985) (Lloyd's, 1985)

collectivisation rule — *see* SYA-level collectivisation rule

collectivise — to manage, administer or otherwise handle a number of separate businesses, transactions or accounts collectively; *cf.* **aggregate**, **agglomerate**, **consolidate**

Committee — the Lloyd's Act 1982, s.5 Committee of Lloyd's. *See* **Council**; **self-regulators-at-Lloyd's**. *Cf.* **Old Committee**

common-use fund — *see* CU fund

COMP — *see* FSA Compensation Scheme Rules

company voluntary arrangement — an Insolvency Act 1986, Part I company voluntary arrangement. *And see* CVA

Completion Accounts and Co-operation Agreement — *see* RRC 9

Conditions & Requirements: Solvency 2000 — *Conditions and Requirements relating to Solvency and Reporting* (Lloyd's, 2000; at Mkt. Bn. Y2404, November 9, 2000 ("31 December 2000 solvency test: eligible assets and valuation of liabilities rules"), Annex 1). *See* **Valuation of Liabilities Rules 2000**

conduit effect — the regulatory, financial and administrative process and dynamic whereby a relevant SYA participant is the conduit of an **assured-at-Lloyd's** to one or more expressly or arguably available PU and or CU claims payment securitisation funds. *Cf.* **solus**

consolidate — to compile into a single set of reporting data the relevant financial affairs of separate connected individuals; *cf.* **agglomerate**, **aggregate**, **collectivise**

Consortium Underwriting 1998 — Consortium Underwriting 1998 (LPSO, February 1998)

consumed PIL — **deployed PIL** actually consumed by actually or notionally received premium. *Cf.* **unconsumed PIL**

conventional RTC — **RTC** as ordinarily conducted at **Lloyd's**, viz., the type of **RTC** described at Byelaw 18 of 1994, Sch. 1, §1, definition of "reinsurance to close", §(a): "an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will discharge or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) either (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business); or (bb) an agreement by the reinsured members that the reinsuring members shall collect on behalf of the reinsured members the proceeds of all such rights and retain them for their own benefit so far as they are not applied in discharge of the liabilities of the reinsured members". See **RTC**. Cf. (for example) **EquitasRe-RTC** and **spoastic RTC**

Conversion 1997 — *Conversion: a guide* (Lloyd's, April 2, 1997)

Core Principles for Underwriting Agents — *Core Principles for Underwriting Agents* (Lloyd's, February 1996; at Byelaw 34 of 1996, Schedule 2)

corporate — relating to a corporate body. Cf. **natural**

Corporate Capital — *A guide to corporate membership* (Lloyd's, September 1993)

corporate Member — a **Member** which is incorporated. Cf. **natural Member**

Corporate Member Supplement 1998 — Corporate participation at Lloyd's and Guidance notes for applicant corporate members — A supplement to the 2nd edition (Lloyd's, July 20, 1998; at Mkt. Bn., July 24, 1998 ("Guides to corporate participation"))

Corporate Members Guidance Notes 1997 — Guidance notes for applicants — corporate member, 2nd ed. (Lloyd's, April 30, 1997)

Corporate Member Holding Structure — any arrangement involving the owning and or controlling of one or more **corporate Members**

Corporate Participation 1997 — *Corporate Participation at Lloyd's* 2nd ed. (Lloyd's, April 30, 1997)

corporate syndicate — a **syndicate** participants on each of which's **YAs** are solely one or more **corporate** (cf. **natural**) **Members**

Corporation — the corporation created by Lloyd's Act 1871, s.3; **Lloyd's** properly so called. Includes relevant Corporation subsidiaries where appropriate. Cf. **Corporation of Lloyd's**, **Society of Lloyd's**

Corporation of Lloyd's — a mythical entity. See **Corporation**, **Lloyd's**, and **Society of Lloyd's**

COSS — Claims Office Support System

Council — (1) the Lloyd's Act 1982, s.3(1) Council of Lloyd's. See **Committee**; **Old Committee**; **self-regulators-at-Lloyd's**; (2) the Council of the European Union

coverholder — the recipient of a binding authority

CP 04/7 — FSA consultation paper 04/7: *Lloyd's: integrated prudential requirements, and changes to auditing and actuarial requirements Including feedback on CP178* (FSA, April 30, 2004)

CP 16 — FSA Consultation Paper 16: *The Future Regulation of Lloyd's* (FSA, November 1998)

CP 16 solvency — FSA Consultation Paper: *Proposals to revise the solvency test applying to Lloyd's* (FSA, December 1999)

CP 48 — FSA Consultation Paper 48: *The Lloyd's Sourcebook* (FSA, May 2000). See **PS 48,66**

CP 66 — FSA Consultation Paper 66: *Prudential requirements for Lloyd's insurance business* (FSA, August 2000). See **PS 48,66**

CP 140 — FSA Consultation Paper 140: *The Interim Prudential Sourcebooks for Insurers and Friendly Societies and the Lloyd's Sourcebook: Guidance on Systems and Controls* (FSA, July 2002)

CP 177 — FSA Consultation Paper 177: *Lloyd's policyholders: Review of compensation arrangements* (FSA, April 2003). See **PS 177**

CP 178 — FSA Consultation Paper 178: *Review of prudential regulation of the Lloyd's market* (FSA, April 2003). See **PS 178**

CP 181 — FSA Consultation Paper 181: *The Interim Prudential sourcebooks for Insurers and Friendly Societies: Implementation of the Solvency I Directives (2002/12/EC and 2002/13/EC)* (FSA, April 2003). See **PS 181**

CP 184 — FSA Consultation Paper 184: *Miscellaneous amendments to the Handbook (No. 8)* (FSA, May 2003)

CPR — Civil Procedure Rules (England and Wales); SI 1998/3132, in force on and from April 26, 1999

CR — credit for reinsurance

Cromer WP — *Report of the Lloyd's Working Party* (Lloyd's, December, 1969)

CU — common-use. Cf. **PU**

CU fund — a claims payment securitisation fund regulatorily required to be maintained in relation to the eligible liabilities of not just one particular **SYA participant** but a number of relevant SYA participants comprising several-liability contributions from a number of relevant SYA participants. Usually (and inaccurately) called a "joint asset fund". Cf. **personal-use fund**. And see **CU**

cuffadaicious — describing an act done following: (1) full, frank, clear, complete disclosure of all relevant facts and circumstances; and (2) full, frank, clear, complete, genuinely expert independent advice; (3) genuinely expert financial, legal and other modelling in relation to all the matters so disclosed

CSU — see **MSU**

CU TF — **common-use** trust fund; usually (misleadingly) "joint asset trust fund"

CVA — see company voluntary arrangement

D

dedicated — a **PU** or **CU** fund available only for particular **Participation Liabilities**, not (as is a not-dedicated fund) for any Participation Liabilities

deductible — see **retention**

deployed PIL — a Member's **PIL** (whether **free PIL** or **tied PIL**) deployed on a **SYA**, whether or not actually consumed by actually or notionally received premium. See **consumed PIL**

Deputy Chairman — a Lloyd's Act 1982, s.4 Deputy Chairman of Lloyd's. See **Chairman of Lloyd's, Chairs, self-regulators-at-Lloyd's**

Developing Broker Relationships — *Developing broker relationships — discussion document* (Lloyd's, 1999)

direction — Lloyd's Act 1982 s.6(6)(b)-envisaged direction

dollars — United States dollars

DPP — Director of Public Prosecutions

DRs — see **Asbestos Documentation Requirements 1**

DTI — Department of Trade and Industry (a UK government ministry)

DTI Prudential Guidance 1996 — *Prudential Guidance Note 1996/1: Guidance on systems of controls over general business claims provisions* (**DTI**, August 1996)

DUL — Declaration of Underwriting Liabilities

E

e&o — errors and omissions

EATD — September 3, 1996 trust agreement between: (1) **Equitas Re** and **Equitas Ltd.** as Grantor; (2) Citibank, NA in its capacity as the American Trustee of each of the separate Lloyd's American Trust Funds created under the Lloyd's American Trust Deed, as Beneficiary; (3) Citibank, NA as Trustee; *also* **RRC 16**. *Cf.* **LATD**

EATF — the trust fund held in accordance with the **EATD**

ECJ — European Court of Justice

ECU — Equitas Claims Unit

EEC Treaty — Treaty establishing the European Economic Community, March 25, 1957. Sometimes called the Treaty of Rome. See consolidated version after October 2, 1997 Treaty of Amsterdam

EGM — extraordinary general meeting (of a company or the **Corporation**)

EL — employers liability

Entitlement — a **Central Accounting** term: "the aggregate amount due to be paid to that participant by the other participants under all System transactions of which the Society has notice which are denominated in that System currency and are due to be settled on the relevant settlement date": Byelaw 20 of 1998, §10(1)(a) ("entitlement" in lower case). *See* **Gross Payment**

EP 1 thru 7 — a type of EquitasRe-reinsured SYA participant

EPP — Estate Protection Plan

EPS — Electronic Placing Support

Equitable Life — Equitable Life Assurance Society. *And see* **Penrose**

Equitas — *see* Equitas Holdings, Equitas Ltd., Equitas Management Services, Equitas Policyholders Trustee, Equitas Re and EquitasRe-RTC Trust. *Cf.* Equitas enterprise

Equitas American TD / TF — *see* **EATD**, **EATF**

Equitas enterprise — as appropriate depending on context, all, some or any of Equitas Re, Equitas Ltd., Equitas Holdings, Equitas Policyholders Trustee, Equitas Management Services, and EquitasRe-reinsurance Trustees

Equitas Holdings — Equitas Holdings Ltd. Incorporated in England & Wales, number 3136296. Owns all the shares in **Equitas Re** and **Equitas Policyholders Trustee**. Its one £1 preference share is owned by the **Corporation**. Its two £50 ordinary shares are owned by **EquitasRe-reinsurance Trustees**

Equitas Holdings Articles — **Equitas Holdings'** Articles of Association of adopted by decision of the sole member on August 30, 1996 as amended by April 26, 2001 members' written resolution

Equitas Ltd. — Equitas Ltd. Incorporated in England and Wales, number 3173352. All 780,000,001 £1 ordinary shares are owned by **Equitas Re**

Equitas Management Services — Equitas Management Services Ltd. Incorporated in England and Wales, number 3136297. All shares are owned by **Equitas Holdings**

Equitas NL 1 — *Old and Open Years Reserving Project: Newsletter No. 1* (Lloyd's, November 1993)

Equitas NL 2 — *Old and Open Years Reserving Project: Newsletter No. 2* (Lloyd's, March 1994)

Equitas NL 3 — *Old and Open Years Project: Newsletter No. 3* (Lloyd's, May 1994)

Equitas NL 4 — *Old and Open Years Project: Newsletter No. 4* (Lloyd's, August 1994)

Equitas NL 5 — *Equitas Project: Newsletter No. 5* (Lloyd's, October 1994)

Equitas Policyholders Trustee — Equitas Policyholders Trustee Limited, incorporated in England and Wales, number 3243970. In **RRC 4** and **RRC 7**, "the Trustee". Its one £100 ordinary share is owned by **Equitas Holdings**. *Cf.* **EquitasRe-reinsurance Trustees** and **RRC 17**

Equitas Re — Equitas Reinsurance Limited, incorporated in England and Wales, number 3136300; where appropriate, refers additionally or instead to **Equitas Ltd.** (especially in relation to **RRC 5**-delegated functions), **Equitas Holdings**, **Equitas Management Services**, and other relevant affiliates and or delegates. Its one £100 ordinary share is owned by **Equitas Holdings**. Equitas Re sold **EquitasRe-reinsurance** and **EquitasRe-RTC** to **EquitasRe-reinsured SYA participants**

EquitasRe-assured-at-Lloyd's — an **assured-at-Lloyd's** insured by a **SYA participant** who is either reinsured by **Equitas Re** or conventionally outward-RTCed (*see* **conventional RTC**) by a **SYA participant** reinsured by Equitas Re; excludes, where the context requires, a **SYA participant** insured by himself or another **SYA participant**. The term should not be construed as an opinion or adjudication of the **EquitasRe-assured's-at-Lloyd's** relevant rights or of **Equitas Re's** relevant obligations in any particular case. *Cf.* **assured-at-Lloyd's**

EquitasRe-reinsurance — the **RRC 4**, §3 product sold to an **EquitasRe-reinsured SYA participant**. *See* **EquitasRe-RTC**

EquitasRe-reinsurance Trust Deed — *see* **RRC 17**

EquitasRe-reinsurance Trustees — the trustees of the trust fund created by **RRC 17**. *Cf.* **Equitas Policyholders Trustee**

EquitasRe-reinsured liability — a liability reinsured by **Equitas Re** under **RRC 4**, §3; a liability of an **EquitasRe-reinsured SYA participant**

EquitasRe-reinsured SYA participant — a **SYA participant** who is a **RRC 4**, Sch. 2, §1-defined "Name" *simpliciter*. *Cf.* a **SYA participant** who is an *ibid.*, "Closed Year Name"

EquitasRe-RTC — the **RTC** effected through **RRC 4**, §3; alluded to at Byelaw 18 of 1994, Sch. 1, §1, definition of "reinsurance to close", §(d): "in relation to the 1992 year of account or any earlier year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract". *Cf.* **conventional RTC**. *See* **EquitasRe-reinsurance**

EquitasRe-RTCed SYA participant — an **EquitasRe-reinsured SYA participant** to the extent that the **RRC 4**, §3 product is a form of **RTC**. *Cf.* **EquitasRe-reinsured SYA participant**. There are at least seven types of **EquitasRe-RTCed SYA participant**: *see* **EP**

Equitas Re's September 3, 1996 US\$400m Undertaking — *see* **RRC 22**

EU — European Union

Eur. Manual — *European Procedures Manual* (Lloyd's, looseleaf; periodically updated)

external insurance regulation — *cf.* external financial-protection regulation

external Member — an external **Member** as defined in Lloyd's Act 1982, s.2(1). *Cf.* **working Member**

F

FAL — "Funds at Lloyd's" as so known in the **Rulebook-at-Lloyd's**, generally comprising funds (in permitted form) held under instruments such as (in the case of the natural Member) the **Lloyd's Deposit TD**, **PTD-personal reserve**, and **New Special Reserve TD**. The term does not include funds held under the **PTD-premium**

Financial Panel — *see* **Morse Panel**

First Antitrust Regulation — Council Regulation 17/62/EEC (February 6, 1962): First Regulation implementing Articles 85 and 86 of the EEC Treaty. *See* **First Insurance Antitrust Regulation**, **Second Insurance Antitrust Regulation**

First Insurance Antitrust Regulation — Council Regulation 1534/91/EEC (May 31, 1991) on the application of Article 81(3) of the EEC Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. *See* **Second Insurance Antitrust Regulation**

First Life Directive — Council Directive 79/267/EEC (March 5, 1979) on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance. *See* **Second Life Directive**, **Third Life Directive**

First Non-Life Directive — Council Directive 73/239/EEC (July 24, 1973) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance. *See* **Second Non-Life Directive**, **Third Non-Life Directive**

First Regime — the now obsolete Lloyd's Act 1871, s.20-21 internal disciplinary regime **at Lloyd's**. *See* **Second Regime** and **Third Regime**

Fisher WP — *Self-Regulation at Lloyd's — Report of the Fisher Working Party* (Lloyd's, May 1980)

FO — front office **at Lloyd's**; that part or those components or funds of, or participants in, the Lloyd's enterprise ordinarily visible and or accessible to the **assured-at-Lloyd's**, such as (for example, as appropriate) the Lloyd's broker, the **SYA participant solus**, the **Corporation** on some direct liability theory, the **Central Fund** on some *ditto*. *Cf.* **BO**, **MO**. *See* **FO-MO-BO™**

FO-MO-BO™ — an analysis technique of the Lloyd's enterprise and its activities, operations and transactions proprietary to Richard J. Astor summarised at Richard J. Astor, *Liability on an Insurance Contract Made at Lloyd's*, at *Torts, Insurance & Compensation Law Section Journal* (New York State Bar Association), Winter 2004, vol. 33, no. 1, pp.18-25

FOIL — Freedom of Information Law (Article 6, Public Officers Law), State of New York

FOL 5 — members' agent's request for withdrawal from the New Central Fund (Mkt. Bn. Y2150, October 20, 1999 ("Application for withdrawals from the New Central Fund"), App. 1)

fpe — financial period ended

FRAG — a particular Financial Reporting and Auditing Guideline (pub. Accounting Standards Board)

FRD — the **Corporation's** Financial Recovery Department

FRED — a particular Accounting Standards Board Financial Reporting Exposure Draft

free PIL — **PIL** which the **Member** is self-regulatorily permitted to deploy (if he can) on any **YA** of any relevant **syndicate**. *Cf.* **tied PIL**

front office — *see* **FO**

FRR — Financial Resource Requirements (see for example Reg. Bn. 56/2000, June 30, 2000 ("Underwriting agents' financial resource requirements (FRRs)"))

FRS — Financial Reporting Standard

FSA — Financial Services Authority. Incorporated in England and Wales, June 7, 1985, number 1920623 under the name Securities and Investments Board; changed its name to FSA October 28, 1997; a private company the liability of whose members is limited to the amount of the guarantees they give to the company. *See* www.fsa.gov.uk

FSA Compensation Scheme Rulebook — the FSA's so-called "COMP Sourcebook" (FSA). *Also* **COMP**

FSA Compensation Scheme Rules — the rules contained in **FSA Compensation Scheme Rulebook**

FSA Glossary — FSA Handbook Glossary; made June 21, 2001; in effect from June 21, 2001 (FSA, 2001)

FSA Guidance P2 — Guidance Note P.2 — Systems and controls over general business claims provisions (FSA)

FSA Lloyd's Rulebook — *See* **LLD**

FSA Rulebook — Interim Prudential Sourcebook for Insurers ('IPRU(INS)'); made June 21, 2001; in effect from December 1, 2001 (FSA, 2002). *Also* **IPRU(INS)**

FSMA 2000 — Financial Services and Markets Act 2000

Fundamental Rules — the (now obsolete) "Fundamental Rules" at Lloyd's Act 1871, Schedule

Future Direction — Lloyd's future direction: statement of policy by the Council of Lloyd's (Lloyd's, July 1997)

fye — financial year ended

G

GEN — General Provisions, Release 28, February 2004 (FSA, February 2004)

General Undertaking — the contract of that name between the **Corporation** and a **natural Member**. Cf. **MA 1**

GIB Advisory Note — *Advisory Note on Lloyd's US Opinions* (Faculty of Actuaries and Institute of Actuaries General Insurance Board, December 1997, amended January 1998 and February 1998)

GISC — General Insurance Standards Council. See www.gisc.co.uk

GISC Commercial Customer Code — *GISC Commercial Code* (**GISC**, June 2000)

GISC Private Customer Code — GISC General Insurance Code for private customers (**GISC**, June 2000)

GISC Rules 2000 — General Insurance Standards Council Rules (**GISC**, June 2000)

GN 20 — Guidance Note 20: *Actuarial Reporting under the Lloyd's Valuation of Liabilities Rules* (approved by the Faculty of Actuaries and Institute of Actuaries' Faculty and Institute Management Committee, November 3, 1997)

GN 33 — Guidance Note 33: *Actuarial reporting for Lloyd's Syndicate Writing US Business* (approved by the Faculty of Actuaries and Institute of Actuaries' Faculty and Institute Management Committee, December 15, 1997)

Golden Rule — In **BBSN circumstances**, and regardless of the insurance contract's governing law, every valid claim on an insurance contract made **at Lloyd's** is payable 100% at Lloyd's, not at a lesser percentage elsewhere (such as at **Equitas Re**) and not by any relevant *solus*

Gower — L.B.C. Gower, *Review of Investor Protection*; Cmnd. 9125 (HMSO, 1984)

GR — consolidated aggregated **SYA participants'** accounts published by **self-regulators-at-Lloyd's** annually; usually **at Lloyd's**, "global accounts" or "global results"

GRD — the **Corporation's** General Review Department

Gross Payment — a Central Accounting term: "the aggregate amount due to be paid by that participant to other participants under all System transactions of which the Society has notice which are denominated in that System currency and which are due to be settled on the relevant settlement date": Byelaw 20 of 1998, §10(1)(b); "gross payment" is in lower case. See **Entitlement**

Guidance Notes: Authorisation Committee — *Guidance Notes for Authorisation Committee* (Lloyd's reference g:j4\IR\LRB2; undated)

H

Hague Convention — Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970; 23 UST 2555; TIAS No. 7444, implemented in the UK by Evidence (Proceedings in Other Jurisdictions) Act 1975

HC — House of Commons

he; him; his — where appropriate, includes "it", "its"

Higgins WP 1 — *Working Party on the Underwriting Agency System at Lloyd's, Part I: Report on Ownership and Control of Underwriting Agencies* (March 28, 1983) (Lloyd's, 1983)

Higgins WP 2 — *Underwriting Agency System at Lloyd's Part II Working party's report on preferred underwriting and parallel syndicates [and] character and suitability — consultative document* (Lloyd's, September 1983)

HL — House of Lords

I

IAIS — International Association of Insurance Supervisors

IBA — as appropriate: (1) insurance broking account (**self-regulators-at-Lloyd's** term); (2) Insurance Banking Account (**GISC** term)

IBNE — incurred but not enough

IBNR — incurred but not reported

IBRC — Insurance Brokers Registration Council

IBRC Code — Code of conduct drawn up by the Insurance Brokers Registration Council pursuant to section 10 of the Insurance Brokers (Registration) Act 1977

ICAEW — Institute of Chartered Accountants in England and Wales

IIC — Illinois Insurance Code

III. — Illinois

Illinois Business 1998 — *The Illinois Business Process* (Lloyd's, July 10, 1998)

Illinois Directory 1998 — *Illinois Directory of Wordings and Guidance Notes* (Lloyd's, July 1998)

ILU — *see* **IUA**

Improving the Annual Venture — *Discussion document on improving the annual venture* (Lloyd's, December 1997)

individual — single. *See* **natural**

INEX — Illinois Insurance Exchange

Information and Administration Agreement — *see* **RRC 8**

INM — incidental non-marine

insolvency guardian — any person charged with administering the affairs of an insolvent natural or corporate person such as (for example, as appropriate) a liquidator, provisional liquidator, administrator, receiver, administrative receiver, trustee in bankruptcy, etc.

Insolvency Regulation — *see* **Insolvency Proceedings Regulation**

Insolvency Proceedings Regulation — Council Regulation 1346/2000/EC (May 29, 2000) on insolvency proceedings

Insolvency Rules 1986 — Insolvency Rules 1986 SI 1986/1925. *Also* **IR 1986**

Institute — *see* **ILU**

insurance — includes reinsurance where appropriate

Insurance Accounts Directive — Council Directive 91/674/EEC (December 19, 1991) on the annual accounts and consolidated accounts of insurance undertakings

Insurance Mediation Directive — Directive 2002/92/EC (December 9, 2002) of the European Parliament and of the Council on insurance mediation

Insurers Administration Order — Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242)

Insurers Winding Up Rules: Insurers (Winding Up) Rules 2001 (SI 2001/3635)

intermingle — to mingle in a single bank account the **PU** funds of **SYA** participants, regardless of the particular **YAs** of particular **syndicates**. *Cf.* **agglomerate**

Inward Reinsurance Documentation Requirements I — *Documentation and Claim Procedure Requirements For Asbestos Bodily Injury Reinsurance Claims, December 21, 2001* (Equitas Re, 2001); also "Reinsurance Documentation Requirements", "RDRs". *Cf.* **Asbestos Documentation Requirements 1**

IOB — Insurance Ombudsman Bureau

IPRU(INS) — IPRU(INS): Interim Prudential Sourcebook: Insurers (FSA, June 2001) *see* **FSA Rulebook**

IR 1986 — Insolvency Rules 1986 SI 1986/1925. *Also* **Insolvency Rules 1986**

IRS — US Internal Revenue Service

it, its — in the case of a partnership, includes relevant "their"

IUA — International Underwriting Association of London. A combination of **LIRMA** and **ILU**

J

James WP — *Report of the Lloyd's Capital Structure Working Party: The Future Development of Lloyd's Capital Structure* (Lloyd's, July 1995)

joint asset — see **CU**

July 20, 2001 press release — **Equitas Holdings'** July 20, 2001 14-page press release EQ 33 ("Financial results for year ended 31 March 2001")

K

Ken. — Kentucky

Kent RC — *Report of the Review Committee on Council Representation and Voting Arrangements at Lloyd's* (Lloyd's, March 1998)

Kent RC Supplement — *Supplementary Report of the Review Committee on Council Representation and Voting Arrangements at Lloyd's* (Lloyd's, September 1998)

Kentucky Common-Use TD 1999 — Lloyd's Kentucky Joint Asset Trust Deed (Lloyd's reference MGTA\USTD\KYJATD97; undated) as amended by Deed of Amendment dated 7 February, 1997

Kentucky Personal-Use TD 1999 — Lloyd's Kentucky Trust Deed (Lloyd's reference ustds\kytd99x)

Kerr Panel — a committee set up in 1993 by the then Chairman of Lloyd's as part of the Lloyd's Legal Disputes Settlement Initiative (LSO 1, p.8.1, §1), also known as the "Legal Panel" and "Legal Advisory Panel". See **Kerr Panel Evaluation**. Cf. **LSO 1** and **Morse Panel**

Kerr Panel Evaluation — **Kerr Panel's** October 27, 1993 report (Lloyd's, 1993; at **LSO 1**, Part 7)

L

LAR — Lloyd's Appeal Rules (at Byelaw 32 of 1996, Schedule 2) See **LDR**

LAS — Lloyd's Arbitration Scheme

LATD — Lloyd's American Trust Deed for general business, originally adopted August 26, 1939 and amended on October 31, 1947; January 14, 1948; October 2, 1963; September 22, 1982; April 7, 1989; December 9, 1993; July 31, 1995; December 21, 1995; September 3, 1996; amended and restated January 7, 1998. Cf. **EATD**; Lloyd's American Trust Deed for long-term business dated January 9, 1991 as amended December 8, 1993

LATF — an individual SYA participant's Lloyd's American Trust Fund created and held under the relevant **LATD**; cf. **EATF**

LC — letter of credit

LCO — Lloyd's Claims Office. Includes delegates such as Xchanging Claims Services Ltd.

LCO (Marine) Ltd. — LCO (Marine) Ltd.

LCO (Non-Marine and Aviation) Ltd. — LCO (Non-Marine and Aviation) Ltd.

LDR — Lloyd's Disciplinary Rules (at Byelaw 31 of 1996, Schedule 2). See **LAR**

LDTF — see **Lloyd's Dollar TF**

Leading Underwriter NMA Basic Agreement 1990 — Leading Underwriters' Agreement (N.M.A.) Basic Agreement (NMA Circular, July 25, 1990)

Legal Panel — see **Kerr Panel**

LIBC — Lloyd's Insurance Brokers' Committee; a committee of the British Insurance & Investments Brokers' Association. See **LMBC**

Life Solvency Directive — Directive 2002/12/EC of the European Parliament and of the Council (March 5, 2002) amending Council Directive 79/267/EEC as regards the solvency margin requirements for life assurance undertakings. *Cf.* **Non-Life Solvency Directive**

LIMNET — London Insurance Market Network

Lioncover — Lioncover Insurance Co. Ltd. Incorporated in England and Wales, January 29, 1987, number 2094618; wholly owned by the **Corporation**

Lioncover Reinsurance Contract — *see* RRC 19

liquidation — liquidation under Insolvency Act 1986, including *ibid.*, Parts IV, VI, etc.

LIRMA — *see* IUA

LLD — FSA Lloyd's Specialist [S]ourcebook ('LLD'); first made June 21, 2001; in effect from December 1, 2001. Release 27, January 2004 unless otherwise stated (FSA). *Also* **FSA Lloyd's Rulebook**

Lloyd's — the Lloyd's Act 1871, s.3 corporation of that name. *See* **Corporation**

Lloyd's Acts 1871-1982 — the four extant Lloyd's Acts of 1871, 1911, 1951 and 1982 as amended

Lloyd's American Corporate Instrument — Lloyd's American Instrument 1995 (General Business of Corporate Members), July 31, 1995, as amended December 21, 1995, April 25, 1996, September 3, 1996, January 7, 1998, and by February 3, 1999 deed of amendment and direction. *Cf.* **Lloyd's US Natural Instrument**. *See now* **Lloyd's American Instrument 1995**

Lloyd's American Instrument 1995 — the consolidated February 13, 2002 version of Lloyd's American Instrument 1995 (General Business of Individual Members) and Lloyd's American Instrument 1995 (General Business of Corporate Members) attached to Mkt. Bn. Y2734 (February 21, 2002; Premiums trust deed/Lloyd's American Instrument amendments — new Lloyd's Asia Instruments'). *Cf.* **Lloyd's American Corporate Instrument**. *See* **Lloyd's Dollar TF**

Lloyd's Brokers Review 1997 — *Review of regulation of Lloyd's brokers and intermediaries — Discussion Document* (Lloyd's, June 1997)

Lloyd's Compensation Instrument — Lloyd's Compensation Instrument (FSA 2003/75)

Lloyd's Deposit — the FAL by that name. *See* **Lloyd's Deposit TD** and **Lloyd's Deposit TF**

Lloyd's Deposit TD — natural **Member**: Lloyd's Deposit Trust Deed DTD G 92 (general business); corporate **Member**: Lloyd's Deposit Trust Deed DTD (CM) G 93 (general business)

Lloyd's Deposit TF — the trust fund constituted by a **Lloyd's Deposit TD**

Lloyd's Dollar TF — Lloyd's US Dollar Trust Fund: the trust fund constituted by Lloyd's American Instrument 1995

Lloyd's enterprise — as appropriate depending on context, all, some or any of **self-regulators-at-Lloyd's**, the **Corporation**, relevant Corporation employees, **Members** collectively, **SYA participants** collectively, members' agencies (*see* **members' agency**), managing agencies (*see* **managing agency**), Lloyd's brokers, **Equitas Re**, the **Central Fund**, and or other relevant persons, bodies, entities, funds, etc. *Cf.* **Lloyd's**

Lloyd's Kentucky Common-Use TD 1999 — Lloyd's Kentucky Joint Asset Trust Deed (Lloyd's reference MGTA\USTD\KYJATD97) as amended by Deed of Amendment dated 7 February, 1997

Lloyd's Kentucky Personal-Use TD 1999 — Lloyd's Kentucky Trust Deed (Lloyd's reference ustds\kytd99x)

Lloyd's policyholder — an **assured-at-Lloyd's** whose insurance contract is evidenced by a policy issued at Lloyd's

Lloyd's Solvency Test Regulations — Insurance (Lloyd's) Regulations 1983 (SI 1983/224)

Lloyd's US Credit-for-Reinsurance Common-Use TD 1999 — Amendment and restatement Lloyd's American credit for reinsurance joint asset trust dated September 15, 1993 as amended and restated September 7, 1995 and as further amended by February 7, 1997 Deed of Amendment

Lloyd's US Credit-for-Reinsurance Common-Use TF 1999 — the fund held under the terms of the Lloyd's US Credit-for-Reinsurance Common-Use TD 1999

Lloyd's US Credit-for-Reinsurance Personal-Use TD 1999 — Lloyd's United States situs credit for reinsurance trust deed; Lloyd's reference ustds/crtd99x. *See* **Lloyd's US Credit-for-Reinsurance Personal-Use TF**

Lloyd's US Credit-for-Reinsurance Personal-Use TF 1999 — the funds held under the terms of the Lloyd's US Credit-for-Reinsurance Personal-Use TD 1999

Lloyd's US Natural Instrument — Lloyd's American Instrument 1995 (General Business of Individual Members) *Cf.* **Lloyd's US Corporate Instrument**

Lloyd's US Natural Instrument TF — the trust fund established under **Lloyd's US Natural Instrument**

Lloyd's US Surplus-Lines Common-Use TD 1999 — Amendment and Restatement Lloyd's American Surplus or Excess Lines Insurance Joint Asset Trust Deed dated September 15, 1993, as amended and restated September 7, 1995, as further amended by Deed of Amendment dated February 7, 1997 and as further amended, with effect from January 1, 1999, by Deed of Amendment dated November 17, 1998 *See* **Lloyd's US Surplus-Lines Common-Use TF 1999**

Lloyd's US Surplus-Lines Common-Use TF 1999 — the funds held under the terms of the **Lloyd's US Surplus-Lines Common-Use TD**

Lloyd's US Surplus-Lines Personal-Use TD 1999 — Lloyd's United States Situs Excess or Surplus Lines Trust Deed (Lloyd's reference mgta\ustd99\sltd99x). *See* **Lloyd's US Surplus-Lines Personal-Use TF**

Lloyd's US Surplus-Lines Personal-Use TF 1999 — the funds held under the terms of the **Lloyd's US Surplus-Lines Personal-Use TD 1999**

LMA — Lloyd's Market Association

LMAS — Lloyd's Members' Agency Services Ltd. Incorporated in England and Wales, October 8, 1990, number 2546614; formerly Additional Underwriting Agencies (No. 8) Ltd. (name changed December 10, 1993)

LMB — Lloyd's Market Board

LMB Priorities 1998 — *Lloyd's Market Board Priorities for 1998* (Lloyd's, February 1998)

LMB Priorities 1999 — *Priorities for growth — Lloyd's Market Board* (Lloyd's, January 1999)

LMB Priorities 2000-2003 — *Priorities for Growth 2000-2003* (Lloyd's, February 2000)

LMBC — London Market Brokers Committee; *see* **LIBC**

LMCS — London Market Claims Services (formerly Duncan and Toplis (Asbestos Services) Ltd.)

LNAWP 1 — *Lloyd's: The Alternative to Reconstruction and Renewal: A Discussion Paper prepared and published by The Lloyd's Names Associations' Working Party* (Lloyd's Names Associations' Working Party, December 1995)

LNAWP 2 — *Lloyd's: The Alternative to Reconstruction and Renewal: "Travelled in Faith": Supplement and Appendices to A Discussion Paper prepared and published by The Lloyd's Names Associations' Working Party* (Lloyd's Names Associations' Working Party, December 1995)

LOC — letter of credit

London Market Principles 2001 — *London Market Principles 2001* ((Protocol and Standards Group, IUA-Lloyd's Forum and LIBC, 2000)

Look into Lloyd's 2002 — *Look into Lloyd's* booklet, Issue 1 (Lloyd's, August 2002)

LPC — London Processing Centre Limited. Incorporated in England and Wales, number 2810403; wholly owned by **IUA** from December 31, 1998. Successor of Policy Signing and Accounting Centre (PSAC)

LPSO — Lloyd's Policy Signing Office. Includes where appropriate LPSO Ltd.; LPSO delegates and or successors such as (for example) **Xchanging Ins-Sure**

LPSOM — the Corporation's Lloyd's Policy Signing and Central Accounting Manual (two volumes, looseleaf). The version consulted for this book was as at November 1997

LRB — Lloyd's Regulatory Board

LSO 1 — Lloyd's Settlement Offer (Lloyd's, December 1993) as amended by Lloyd's Settlement Offer Supplement, December 31, 1993. See **Kerr Panel** and **Morse Panel**

LSO 1 Agreement — the unexecuted Names' Settlement Agreement set out at **LSO 1**, Part 9

LSO 2 — the offer set out at **SOD**

LSW — Lloyd's Special Wording

LUA — Lloyd's Underwriters Association

LUAA — Lloyd's Underwriting Agents Association

LUC — London Underwriting Centre

LUCRO — Lloyd's Underwriters Claims and Recoveries Office. See **LCO**

LUNCO — Lloyd's Underwriters Non-Marine Claims Office. See **LCO**

LUNMA — see **NMA**

M

MA — marine

MA 1 — Membership Agreement (Corporate Member) between the **Corporation** and a **corporate Member** (Lloyd's). Cf. **General Undertaking**

managing agency — a company or partnership registered as a managing agency under Byelaw 4 of 1984 etc. Includes, where appropriate, (1) an **active underwriter** personally; (2) a run-off agent or agency as managing agency contractual sub-agent and or personally

Managing Agency & Syndicate Guidance 1998 — *Guidance Notes for Applicants: establishing a new managing agent; establishing a new syndicate; acquiring control of a managing agent, third edition* (Lloyd's, Regulatory Division, May 1998)

MAP — Modified Arbitration Procedure

MAPR — Modified Arbitration Procedure Rules

Market Bulletin — see **Mkt. Bn.**

MCS — Members' Compensation Scheme

Member — a (**natural** or corporate, as appropriate) member of the **Corporation**. Where appropriate includes: (1) an underwriting, non-underwriting and or not-underwriting Member; (2) an **external Member** and **working Member**; (3) a former Member, including one **EquitasRe-RTCed**; (3) a deceased Member's personal representative; (4) an insolvent Member's **insolvency guardian**; (5) a **SYA participant**

members' agency — a company or partnership registered as a members' agency under Byelaw 4 of 1984 etc. Includes where context requires a Lloyd's adviser

Membership — membership of the **Corporation**

Membership-level several liability principle — the principle that an **underwriting Member's** Membership (cf. **SYA**) liabilities are several, not joint or joint-and-several. Cf. **SYA-level several liability rule**

Membership Brochure — *Brochure for Applicants for Underwriting Membership* (Lloyd's, 1984)

MFD — the **Corporation's** Members' Funds Department

MHC — Members' Hardship Committee

Mkt. Bn. — a Market Bulletin; at **Lloyd's**, a communication so called promulgated by **self-regulators-at-Lloyd's**. Cf. **Reg. Bn.**

MM — the **Corporation's** Membership Manual (Lloyd's, looseleaf)

MO — (1) motor; (2) mid-office **at Lloyd's**: claims payment securitisation trust and other funds accessible to the **assured-at-Lloyd's** in certain circumstances *via* the relevant **SYA participant** as a conduit. Cf. BO, FO. *And see* **FO-MO-BO™**

Model Code: Insider Dealing — *Lloyd's Model Code for Dealing in Securities by Certain Members of the Lloyd's Community* (Lloyd's, 1995; attached to Mkt. Bn., May 7, 1997, Y577)

mono-slip — a **mono-subscribed** placing slip or lineslip. Cf. **poly-slip**

mono-stamp — a **SYA** comprising a **spoastic** participant. Cf. **poly-stamp**; **SYA stamp**

mono-subscribed — a placing slip or lineslip subscribed by only one **mono-stamp** or only one **poly-stamp**. The resulting slip is a **mono-slip**. Cf. **poly-subscribed**, **poly-slip**

Morse CR — *A New Structure of Governance for Lloyd's — Report of the Working Party Chaired by Sir Jeremy Morse* (Lloyd's, June 1992)

Morse Panel — a committee set up in 1993 by the Chairman of Lloyd's as part of the Lloyd's Legal Disputes Settlement Initiative; also the "Financial Panel" and "Financial Advisory Panel". Reported to the Chairman of Lloyd's, November 18, 1993. *See* **LSO 1**, **Kerr Panel**

MPs' Interests — *Registration of Lloyd's Syndicates — Report together with the Proceedings of the Committee relating to the Report and Minutes of Evidence*, House of Commons Select Committee on Members' Interests, Second Report, Session 1993-94, June 14, 1994 (HMSO, 1994)

MURS 2004 — Mkt. Bn. Y3156 (October 7, 2003; 'The membership and underwriting conditions and requirements (funds at Lloyd's) (M&URS)')

N

N. Am. Manual — North American Manual (Lloyd's, looseleaf; periodically updated)

NAIC — National Association of Insurance Commissioners

NAIC Review 1998 — *Lloyd's: A Review by US State Insurance Regulators — Report of the Examination Team to the Surplus Lines (E) Task Force on September 14, 1998* (NAIC, 1998; adopted September 14, 1998: NAIC 1998 Winter National Meeting, Synopsis, p.36 of 43, report of (E) Task Force — Surplus Lines)

NAIC Review 1999 — *Lloyd's: A Follow-Up Review by U.S. State Insurance Regulators* (NAIC, December 6, 1999)

NAIC Review 2003 — *Lloyd's: A Follow-Up Review by U.S. State Insurance Regulators* (NAIC, December 2003)

Name — colloquialism at Lloyd's and elsewhere for **Member**, **underwriting Member**, **working Member**, **SYA participant**, etc.

NASAA — North American Securities Administrators Association, Inc.

NASAA Agreement — the July 11, 1996 agreement between: (1) the **Corporation**; (2) the Coordinating Committee of the North American Securities Administrators Association. *See* **State Agreement**

natural — human; Cf. corporate; **individual**

NCFB — *see* New Central Fund Byelaw

Neill — *Regulatory Arrangements at Lloyd's — Report of the Committee of Inquiry, presented to Parliament by the Secretary of State for Trade and Industry*, January 1987 (Cm 59; HMSO)

New Central Fund — the **Central Fund** constituted by the New Central Fund Byelaw. Cf. **Old Central Fund**

New Central Fund Byelaw — New Central Fund Byelaw (No. 23 of 1996), as amended by New Central Fund (Amendment) Byelaw (No. 27 of 1996), New Central Fund (Amendment No. 2) Byelaw (No. 35 of 1996), New Central Fund (Amendment No. 3) Byelaw (No. 22 of 1997), New Central Fund (Amendment No. 4), and Byelaw (No. 32 of 1997) Amendment Byelaw (No. 9 of 2001)

NewCo — *see* **Equitas Re**

New Special Reserve TD — New Special Reserve Trust Deed. *And see* **Special Reserve TD**

New Special Reserve TF — the fund held under the **New Special Reserve TD**. *And see* **Special Reserve TF**

NM — non-marine

NMA — Lloyd's Underwriters' Non-Marine Association Limited. Incorporated by guarantee January 3, 1991, in England and Wales, number 2571285

Non-Life Solvency Directive — Directive 2002/13/EC of the European Parliament and of the Council (March 5, 2002) amending Council Directive 73/239/EEC as regards the solvency margin requirements for non-life assurance undertakings. *Cf.* **Life Solvency Directive**

NYID — New York State Insurance Department

NYID Report 1995 — P. Cohen, B. Ganley and J.N. Bushell, *Report on examination of Lloyd's, London as of December 31, 1993* (**NYID**, May 11, 1995)

O

OCFB — *see* Old Central Fund Byelaw

OECD — Organisation for Economic Cooperation and Development

Old Central Fund — the **Central Fund** constituted by the Old Central Fund Byelaw. *Cf.* **New Central Fund**

Old Central Fund Byelaw — Central Fund Byelaw (No. 4 of 1986; passed July 14, 1986; in force from July 15, 1986), as amended by Central Fund (Amendment) Byelaw (No. 10 of 1987), Central Fund (Amendment No. 2) Byelaw (No. 9 of 1988), Corporate Members (Consequential Amendments) Byelaw (No. 20 of 1993), New Central Fund Byelaw (No. 23 of 1996), and Amendment Byelaw (No. 9 of 2001). *Cf.* **New Central Fund Byelaw**

Old Committee — the Lloyd's Act 1871. s.11 Committee. *Cf.* **Committee**

open-YA-stamp cash call — a cash call made on the participants of a **SYA** other than at (and thus before) the juncture at which their collectivised accounts close by conventional outward RTC. *Cf.* **closing-YA cash call**

Open-YA-stamp Cash Call Requirements 1999 — Cash Call Statements (Contents and Form) Requirements (1999) (at Mkt. Bn. Y2035, April 19, 1999 ("Distribution and other ancillary matters"), Annex 1); apply only to **open-YA-stamp cash calls**

OPIL — overall premium income limit: in simple terms, maximum **PIL** allocated by the **Council** to a particular **underwriting Member** to be deployed by him on **SYAs** of his choice budding in one particular **UY**. *See* **PIL**

OPL — *see* **OPIL**

OPW — other personal wealth

originalis — in relation to a particular **insurance** transaction, a **SYA participant** subscribing to the slip; *cf.* in relation to the same insurance transaction, an inward-RTCing **SYA participant**

Outline Guide — An outline guide to individual membership of Lloyd's (Lloyd's, August 1997)

P

PAN — premium advice note

panel auditor — *see* recognised accountant

parallel syndicate — a syndicate the relevant **SYA** of which comprises one corporate Member, which Member sells insurance through that **YA** in parallel with a particular **SYA stamp** comprising other participants

Participation Liabilities — liabilities incurred by an **underwriting Member** in the course of conducting an insurance business at **Lloyd's**

passivity rule — see SYA-level passivity rule

PCW Offer 1 — *The PCW Settlement Offer made by Lloyd's, April 1987, Offer 1 Documentation* (Lloyd's, 1987)

PCW Offer 2 — *The Settlement Offer made by Lloyd's, April 1987, Offer 2 Documentation* (Lloyd's 1987)

Penrose — Lord Penrose: *Report of the Equitable Life Inquiry* (House of Commons; HC 290) (Stationery Office, March 8, 2004). And see *Equitable Life*

Pepper Proposition — that a managing agency should not bud a YA of a particular syndicate if relevant trading conditions are inauspicious

personal-use fund — see **PU fund**

PIL — premium income limit actually deployed by an **underwriting Member** on a particular **SYA**, who to that extent becomes a **SYA participant**; akin to gambling chips. See **OPIL**

PML — Probable Maximum Loss

PN 2 — *Practice Note 2: The Lloyd's market* (Auditing Practices Board, July 1992), at *Auditing & Reporting 1997/98* (ICAEW, 1997), p. 409-479

PNSL — "pay now, sue later" — a colloquialism for the restraint-of-suit clauses in various Rulebook-at-Lloyd's instruments

poly-slip — a **poly-subscribed** placing slip or lineslip. Cf. **mono-slip**

poly-stamp — a **SYA** comprising more than one participant. Cf. **mono-stamp**

poly-subscribed — a placing slip or lineslip subscribed by more than one **SYA stamp** (whether mono-stamp or poly-stamp). The product is a **poly-slip**. Cf. **mono-subscribed**

Premiums Trust Deeds CD 1998 — *Proposed changes to the Premiums Trust Deeds — Consultative Document* (Lloyd's, June 8, 1998)

PRF — Personal Reserve Fund. See **PTD-personal reserve**

PRIN — *Principles for Businesses*, Release 28, February 2004 (FSA, February 2004)

Private Capital Interim Report — *Private Capital At Lloyd's — An Interim Report from the Private Capital Group* (Lloyd's, January 1999)

Private Capital Report — *Private capital at Lloyd's: proportional reinsurance syndicates — A consultation document* (Lloyd's, April 1999)

procedural coverage — coverage as a function of procedural requirements such as being able to prove, if properly required, procedural matters such as (for example) the relevant insuring **SYA participants**, the relevant insurance contracts, the relevant lines, the relevant slips, etc.

Proportionate Cover — as appropriate, a **Proportionate Cover Plan**, a **RRC 4**, Sch. 2, §1 Proportionate Cover Rate, a **Retrocession Plan** or a **RRC 5**, Sch. 3, §17 Retrocession Rate

Proportionate Cover Plan — the **Equitas Re** proportionate cover plan at **RRC 4**, §3.5 and *ibid.*, Sch. 3. Cf. **Retrocession Plan**

provisional liquidator — an Insolvency Act 1986, s.135 provisional liquidator

PRS I — proportional reinsurance syndicate management agreement

PSAC — see **LPC**

PS 16 — *Response Paper on Consultation Paper 16 — The Future Regulation of Lloyd's* (FSA, June 1999)

PS 16 return — *The Lloyd's Return — Proposals following on from Consultation Paper 16 (The future regulation of Lloyd's)* (FSA, December 1999)

PS 48,66 — FSA Policy Statement: *The Lloyd's sourcebook: Feedback on CP48 and CP66* (FSA, March 2001)

PS 177 — FSA Policy Statement: *Lloyd's policyholders: Review of compensation arrangements including feedback on CP177 and made text* (FSA, October 2003)

PS 178 — Annex 4 of CP 04/7

PS 181 — FSA Policy Statement: *Implementation of the Solvency I Directives into the Interim Prudential sourcebooks for Insurers and Friendly Societies — Feedback on CP181 and made text* (FSA, September 2003)

PSLI — personal stop loss insurance

PTD — a Lloyd's premiums trust deed

PTD 1999 — PTD (general) 1999 and or PTD (short-term life) 1999, as appropriate

PTD 2002 — PTD (general) 2002 and or PTD (short-term) life 2002, as appropriate

PTD (general) — a form of **PTD** for general (rather than short-term life) business

PTD (general) 1999 — Lloyd's premiums trust deed (general business) (PTD G 99)

PTD (general) 2002 — Lloyd's premiums trust deed (general business) (PTD G 2002) (Lloyd's, 2002, attached to Mkt. Bn. Y2734 (February 21, 2002; 'Premiums trust deed/Lloyd's American Instrument [etc.]')

PTD-personal reserve — a **PTD**'s provisions applicable to the **PRF**

PTD-premium — a **PTD**'s provisions applicable to premium and other relevant income

PTD (short-term life) 1999 — Lloyd's Premiums Trust Deed (long-term business) PTD L 99

PTD (short-term life) 2002 — Lloyd's Premiums Trust Deed (long-term business) PTD L 2002 attached to Mkt. Bn. Y2734 (February 21, 2002; 'Premiums trust deed/Lloyd's American Instrument [etc.]')

PTF — funds held under the terms of a **PTD**

PTF 1999 — funds held under a PTD (general) 1999 and or PTD (short-term life) 1999, as appropriate

PTF 2002 — funds held under **PTD 2002**

PTF-personal reserve — that part of a PTF containing a Member's **PRF**

PTF-premium — that part of a **PTF** containing the individual **SYA participant's** premium income

PU — personal use; *cf.* **CU**

PU fund — a claims payment securitisation fund regulatorily required to be maintained in relation to, and comprising assets derived from and or attributable specifically and solely to, the relevant insurance business of one particular **Member** and or **SYA participant** in order to discharge his Lloyd's Act 1982, s.8(1) liabilities. *Cf.* **CU fund**. *And see* **PU**

pure-SYA — the assets and liabilities accruing to the participants on a particular **SYA** other than from inward-RTCd business. The Market expression is "pure year"

pure-SYA — the assets and liabilities accruing to the participants on a particular **SYA** other than from inward-RTCd transactions. Usually **at Lloyd's**, "pure year"

R

R&R — the exercise **at Lloyd's** known as Reconstruction & Renewal, including (for example) the settlement, **EquitasRe-reinsurance** and **EquitasRe-RTC** exercise **at Lloyd's**, consummated principally in **RRC 1** (settlement component) and **RRC 4** (**EquitasRe-RTC** component), and other **RRCs**. *See terms beginning "R&R", "RRC" and "RRD"*

R&R 1 — *Reconstruction & Renewal* (Lloyd's, May 1995)

R&R 2 — *Reconstruction & Renewal: Progress Report* (Lloyd's, October 1995)

R&R 3 — *Reconstruction & Renewal: papers on alternatives* (Lloyd's, January 1996)

R&R 4 — *Reconstruction & Renewal: Allocating the Settlement* (Lloyd's, February 1996)

R&R 5 — *Reconstruction & Renewal: Indicative Finality Statement* (Lloyd's, March 1996). *See* **R&R 6** and **R&R 8**

R&R 6 — *Reconstruction & Renewal: Guide to your Indicative Finality Statement* (Lloyd's, March 1996). See **R&R 8**

R&R 7 — *Reconstruction & Renewal: Towards the Settlement* (Lloyd's, May 1996)

R&R 8 — *Reconstruction & Renewal: Indicative Finality Statement* (Lloyd's, June 1996). See **R&R 11** and **R&R 12**

R&R 9 — *Reconstruction & Renewal: Guide to your Indicative Finality Statement* (Lloyd's, June 1996)

R&R 10 — *Reconstruction & Renewal: Settlement Information* (Lloyd's, June 1996)

R&R 11 — *Reconstruction & Renewal: Finality Statement* (Lloyd's, July 1996)

R&R 12 — *Reconstruction & Renewal: Finality Statement and Form of Acceptance* Guidance Notes (Lloyd's, July 1996)

R&R 13 — *Reconstruction & Renewal: Settlement Offer* (Lloyd's, July 1996); also **SOD**

R&R 14 — *Reconstruction & Renewal: Guidance Notes: Finality Statement and supporting data* (Lloyd's, August 1996)

RA — report and accounts

RDRs — see **Inward Reinsurance Documentation Requirements 1**

Reader's Guide — *Reader's Guide* (FSA, October 17, 2002)

receivership — receivership under Insolvency Act 1986, Part III

Reconstruction & Renewal — see **R&R**

Reconstruction and Renewal Completion Agreement — see **RRC 14**

recourse — direct and or indirect recourse as appropriate

Recruitment Blind Spot — financial results and managerial performance that the recruit is unable to see

refusenik — colloquially, a **Member** who declined, or whom **self-regulators at Lloyd's** deemed declined, to enter into **RRC 1**

Reg. Bn. — Regulatory Bulletin; **at Lloyd's**, a communication of that type promulgated by **self-regulators-at-Lloyd's**; cf. **Mkt. Bn.**

Reg. Plan 1996 — *Lloyd's Regulatory Plan 1996* (Lloyd's, January 17, 1996)

Reg. Plan 1997 — *Lloyd's Regulatory Report for 1996 and Regulatory Plan 1997* (Lloyd's, February 1997)

Reg. Plan 1998 — *Lloyd's Regulatory Plan for 1998 and Regulatory Report for 1997* (Lloyd's, January 1998)

Reg. Plan 1999 — *Lloyd's Regulatory Plan for 1999 and Regulatory Report for 1998* (Lloyd's, January 1999)

Reg. Plan 2000 — *Raising Standards — Lloyd's Regulatory Plan 2000* (Lloyd's, 2000)

Reg. Review 1997 — *Report of Lloyd's Regulatory Review Group* (Lloyd's, May 1997)

Regulated Activities Order — Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544)

Regulation — (1) a regulation made under Lloyd's Act 1982, s.6(6)(a)(i); (2) a regulation made by relevant EU organs

Regulatory Bulletin — see **Reg. Bn.**

Reinsurance and Run-Off Agreement — see **RRC 4**

Reinsurance Contract — see **RRC 4**

Reinsurance Directive — Council Directive 64/225/EEC (February 25, 1964) on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession

Reorganisation Directive — Council Directive 2001/17/EC (March 19, 2001) on the reorganisation and winding-up of insurance undertakings

Reorganisation Regulations — Insurers (Reorganisation and Winding Up) Regulations 2003 (SI 2003/1102)

Report on Regulation 1999 — Lloyd's Regulatory Board report on regulation in 1999 in Corporation RA fye December 31, 1999, p.37

retention — (1) the assured's uninsured personal liability; (2) the insurer's unceded personal liability. Sometimes called "deductible" or "excess"

Retrocession Agreement — *see* **RRC 5**

Retrocession Contract — *see* **RRC 5**

Retrocession Plan — the **Equitas Ltd.** scheme at **RRC 5**, §2.4 and *ibid.*, Sch. 3. *Cf.* **Proportionate Cover Plan**

RICO — Racketeer Influenced and Corrupt Organizations chapter of the Organized Crime Control Act (Pub. L. No. 91-452; 84 Stat. 941; 18 USC §§1961-1968)

Rights Guide 1996 — Guide to the Rights of Individual Lloyd's Members (Lloyd's, May 1996)

Risk-Based Capital 1995 — Risk-based capital for Lloyd's — a consultative document (Lloyd's, August 1995)

Risk-Based Capital 1996 — Risk-based capital — The Risk Assessment Approach — consultative document (Lloyd's, July 1996)

Risk-Based Capital 1997 — *Guide to the Risk Assessment Framework* (Lloyd's, July 1997)

Risk Coding 1997 — *Risk Coding Guidance Notes for the 1997 underwriting year of account* (LPSO, February 1997), comprising five Appendices. Appendix 1: risk codes by risk category; Appendix 2: risk codes by type of risk Appendix 3: risk codes alphabetically; Appendix 4: designation of risk codes to solvency reserve classes; Appendix 5: OECD risk categories

Risk Registration Scheme 2000 — Lloyd's Risk Registration Scheme (attached to Mkt. Bn. Y2119, August 26, 1999 ("Risk registration — operation of scheme"))

RITC — *see* **RTC**

Room, the — one or more of the Market's trading floors in the 1986 Building, One Lime Street, London EC3

RRC — an agreement or trust deed arising from **R&R**

RRC 0 — the August 9, 1996 "Underwriting Agents' Contribution Agreement" between: (1) the **Corporation**; (2) the "HC Agents" as defined; (2) the "PC Agents" as defined; (3) the "EO Agents" as defined; (4) **Equitas Re**

RRC 1 — the R&R "Settlement Agreement" at *SOD*, App. 1 between: (1) the **Corporation**; (2) **Equitas Re**; (3) "Accepting Names" as defined; (4) "E&O Insurers" as defined; (5) "Underwriting Agents" as defined; (6) "Auditors" as defined; (7) "Brokers" as defined; (8) "PSL Underwriters" as defined; (9) AUA 9; (10) Citibank NA; (11) Royal Trust Corporation of Canada; (12) "Trustee" as defined

RRC 2 — the "Supervisory Management Agreement" between: (1) **Equitas Re**; (2) the particular managing agency; (3) the **Corporation**. Entered into at various dates in December 1995

RRC 3 — the "Action Group Settlement Agreement" between: (1) the **Corporation**; (2) the particular Members' action group and each of its members; (3) "E&O Insurers" as defined; (4) "Underwriting Agents" as defined; (5) "Auditors" as defined; (6) "Trustee" as defined

RRC 4 — the September 3, 1996 "Reinsurance and Run-Off Agreement" between: (1) **Equitas Re**; (2) AUA 9; (3) "Names" as defined; (4) "Closed Year Names" as defined; (5) the **Corporation**; (6) **Equitas Ltd.**; (7) AUA 10; (8) **Equitas Policyholders Trustee**. Sometimes called "RROC" or "the Reinsurance Contract". Amended and corrected by Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997

RRC 5 — the September 3, 1996 "Retrocession Agreement" at **RRC 4**, App. 2 between: (1) **Equitas Re**; (2) **Equitas Ltd.**

RRC 6 — the August 1996 run-off administration services agreement for prime contractors between: (1) **Equitas Ltd.**; (2) the particular "Contractor"

RRC 7 — the September 2, 1996 declaration of trust at **RRC 4**, App. 1 by, and the trust deed governing, **Equitas Policyholders Trustee**

RRC 8 — the May 2, 1996 "Information and Administration Agreement" between: (1) **Equitas Re**; (2) the particular "Managing Agent"; (3) the **Corporation**

RRC 9 — the September 3, 1996 "Completion Accounts and Co-operation Agreement" between: (1) **Equitas Re**; (2) **Equitas Ltd.**; (3) "Managing Agents" as defined

RRC 10 — the August 15, 1996 "Brokers' Agreement" between: (1) the **Corporation**; (2) **Equitas Re**; (3) "the Brokers" as defined

RRC 12 — the 1996 "supplemental agreement" concerning the members' agency's entitlement to and **R&R** use of "Accelerated Profit Commission" (as defined) between: (1) "Names" as defined; (2) each particular "Members' Agent" as defined

RRC 13 — the "Run-off Administrative Services Agreement" between (1) **Equitas Ltd.**; (2) the particular "Contractor"; (3) the particular "Run-off Company"

RRC 14 — the September 1996 "Reconstruction and Renewal Completion Agreement" between: (1) the Corporation; (2) **AUA 9**; (3) **Equitas Holdings**; (4) **Equitas Re**; (5) **Equitas Ltd.**; (6) Additional Securities Ltd.

RRC 16 — *see* **EATD**

RRC 17 — the September 1996 trust deed between: (1) the **Corporation**; (2) the "Original Trustees" as defined; (3) **Equitas Holdings**; (4) **Equitas Ltd.** The trust deed governing the **Equitas Re-insurance Trustees**

RRC 18 — the September 3, 1996 Collateral Agreement between: (1) **Equitas Ltd.**; (2) **NYID**

RRC 19 — the October 1996 Agreement amending a collateral agreement dated 3 September 1996 (**RRC 18**) between: (1) **Equitas Ltd.**; (2) **NYID**

RRC 20 — the September 4, 1996 Assignment Agreement between: (1) **Equitas Ltd.**; (2) Citibank NA

RRC 21 — the September 4, 1996 Assignment Agreement — Financial Reinsurances between: (1) **AUA 9**; (2) the "Relevant Names" as defined; (3) the **Corporation** and **AUA 10** as "Managing Agent's Trustees" as defined; (4) **Equitas Re**

RRC 22 — September 3, 1996 Agreement between: (1) **Equitas Ltd.**; (2) **NYID**; also **Equitas Re**'s September 3, 1996 US\$400m Undertaking

RRC 23 — September 4, 1996 Custody Agreement relating to Charged Accounts between: (1) Bankers Trust Company; (2) **Equitas Ltd.**; (3) **NYID**

RRC 24 — October 1996 Custody Agreement relating to Charged Accounts between: (1) Bankers Trust Company; (2) **Equitas Ltd.**; (3) **NYID**

RRC 25 — September 3, 1996 Memorandum of Waiver between: (1) **Equitas Ltd.**; (2) **NYID**

RRC 26 — the December 18, 1997 "Lioncover Reinsurance Contract" between: (1) **Equitas Re**; (2) **Equitas Ltd.**; (3) **Lioncover**; (4) **AUA 9**; (5) Syndicate 9001 Names; (6) PCW Names; (7) the **Corporation**; (8) **SUM**

RRD — a document, usually a letter, arising from or directly related to **R&R**

RRD 1 — **Equitas Holdings** (Jeremy Heap) to **NYID** (V. Laurenzano), August 29, 1996

RRD 2 — the **Corporation** (David Westby) to **NYID** (Vincent Laurenzano), August 30, 1996; 2 pages; "You have asked us to provide you ..."

RRD 3 — the **Corporation** (David Westby) to **NYID** (Vincent Laurenzano), August 30, 1996; 1 page; "To the best of our knowledge and belief ..."

RRD 4 — **DTI** (Martin Brebner) to **NYID** (V. L. Laurenzano), August 30, 1996

RRD 5 — Citibank NA (N.A. Jones) to **NYID** (Vincent Laurenzano), August 30, 1996

RRD 6 — **Equitas Re** (J. V. Barker) to **NYID** (V. L. Laurenzano), August 30, 1996

RRD 7 — **NYID** Superintendent of Insurance (Edward J. Muhl) to **Chairman of Lloyd's** and Citibank NA (Peter von Kaufman), September 3, 1996; 12 pages

RRD 8 — LeBoeuf, Lamb, Greene & MacRae (Jeffrey Mace) to **NYID** (Vincent Laurenzano), September 3, 1996

RRD 9 — **NYID** Superintendent of Insurance (Edward J. Muhl) to **Chairman of Lloyd's** and Citibank NA (Peter von Kaufman), September 3, 1996; 1 page ("Further to my letter of September 3, 1996 ...")

RRD 10 — **DTI** (R. H. Hobbs) to **Equitas Re** (M. J. Crall), September 3, 1996

RRD 11 — **DTI** (Jonathan Spencer) to **NYID** (V. L. Laurenzano), September 3, 1996

RRD 12 — **Equitas Holdings** (J. V. Barker) to **NYID** (V. L. Laurenzano), September 3, 1996

RRD 22 — the **Corporation** (David Westby) to **NYID** (V. L. Laurenzano), August 30, 1996; 1 page ("The Corporation of Lloyd's ... hereby agrees to provide ...")

RROC — *see* **RRC 4**

RSC — Rules of the Supreme Court (England), replaced on April 26, 1999 by **CPR**

RSG — the **Corporation's** Regulatory Services Group

RTC — (1) *n.*: reinsurance-to-close; (2) *v.t.*: to reinsure-to-close. (hyphens added for clarity). Often at Lloyd's "RITC", "R/ITC", etc.

RTFR — Lloyd's: a route forward — Report of the Task Force January 1992 (Lloyd's, January 1992)

Rulebook-at-Lloyd's — the Lloyd's enterprise's own express written self-regulatory regime, promulgated by or on behalf of or with the authority of the **Council**, including (as appropriate) such instruments as Lloyd's Act 1982, s.6 byelaws (including, for example, standard-form agency agreements scheduled thereto), Lloyd's Act 1982, s.6 regulations, *ibid.*, s.6 directions, codes of practice, relevant trust deeds (including those merely approved (*cf.* prescribed or promulgated) by external insurance regulators), and substantive provisions in **Mkt. Bns.** and **Reg. Bns.** Includes where appropriate **Lloyd's Acts 1871-1982**. Does not include (for example) regulatory measures promulgated by external regulators including **FSA Rulebook** and **FSA Lloyd's Rulebook (LLD)**. Does not include customary practice at Lloyd's. *See* **Back-Office Authority**

Run-Off Companies CD — *Consultative document on run-off companies and related arrangements* (Lloyd's, August 1994)

Rulebook-at-Lloyd's — the Lloyd's enterprise's own written self-regulatory regime, promulgated by or on behalf of or with the authority of the **Council**, including (as appropriate) such instruments as Lloyd's Act 1982, s.6 byelaws; Lloyd's Act 1982, s.6 regulations; Lloyd's Act 1982, s.6 directions; and such other relevant formal measures as codes of practice, and relevant provisions in **Mkt. Bns.** and **Reg. Bns.** Does include (for example) relevant trust deeds (including those approved by external insurance regulators). Does not include (for example): (1) law; (2) extra-legal guidance of external insurance regulators; (3) uniquely customised provisions (if any) in a particular insurance contract made at Lloyd's; (4) custom; (5) practice

Run-off Administrative Services Agreement — *see* **RRC 13**

run-off company — a company managing the run-off of an insurance enterprise; *cf.* an insurance enterprise in run-off

S

S & M — *Report to the Committee known as the Lloyd's Settlement Validation Steering Group* (Slaughter & May, April 2, 1996)

SAO — statement of actuarial opinion

SCA I — agency agreement between a corporate **Member** and a **managing agency** (often at Lloyd's "the managing agent's agreement (corporate)") at Byelaw 8 of 1988, Schedule 4. *Cf.* **SUA 1**

scheme of arrangement — a Companies Act 1985, s.425 scheme of arrangement

scratch — (1) *n.* the active underwriter's initials on a slip or other active underwriting document; (2) *v.t.* to apply a scratch

SEC — Securities and Exchange Commission

Second Insurance Antitrust Regulation — Commission Regulation 3932/92/EEC (December 21, 1992) on the application of Article 81(3) of the EEC Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector. *See* **First Insurance Antitrust Regulation**

Second Life Directive — Council Directive 90/619/EEC (November 8, 1990) on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC

Second Non-Life Directive — Council Directive 88/357/EEC (June 22, 1988) on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC

Security at Lloyd's 2000 — *Security at Lloyd's 2000* (Lloyd's, May 2000)

Security at Lloyd's 2001 — *Security at Lloyd's 2001* (Lloyd's, 2001; the pdf of that name at www.lloyds.com, June 23, 2002). *See* **Security at Lloyd's 2001 (short)**; **Chain of Security 2002**

Security at Lloyd's 2001 (short) — *Security at Lloyd's 2001* booklet (Lloyd's, 2001). *See* **Security at Lloyd's 2001**; **Chain of Security 2002**

Security TD (natural) — natural Members: Lloyd's Security and Trust Deed STD G 92 (general business)

Security Underlying Policies 1994 — *Security underlying policies issued at Lloyd's as at 31 December 1994* (Lloyd's, June 1995)

self-regulators-at-Lloyd's — as appropriate, all, some or any of the members individually or collectively of all, some or any of the **Committee**, the **Council**, the **Old Committee**, Lloyd's Market Board, Lloyd's Regulatory Board, Lloyd's Franchise Board, the **Chairs**, and the (proper or improper) agents, delegates and servants of any of the foregoing including (for example) relevant **Corporation** employees. *Cf.* external insurance, financial-protection, and other regulators such as **FSA**, **GISC**, **NYID** or regulatory fora such as **NAIC**

Settlement Agreement — *see* **RRC 1**

SFO — Serious Fraud Office

Sheldon WP — *Working party on Names' voting rights and related matters, final report* (Lloyd's, June 1994)

SI — Statutory Instrument

SIA 1 — standard inter-agencies agreement between a **members' agency** and a **managing agency** at Byelaw 8 of 1988, Schedule 2 (often called by "Lloyd's" "the agents' agreement"). *See* **SCA 1**, **SMA 1**, **SMA 2**, **SSA 1**, **SUA 1**

SIB — *see* **FSA**

situs — location, usually in the context of a particular risk or a particular assured (US)

SL — surplus lines

SLP — Scottish Limited Partnership

SMA 1 — standard agency agreement between a **Member** and his **members' agency** (and between a Member and a members' agency which happens also to be the **managing agency** of one or more of his chosen SYAs) at Byelaw 1 of 1985, Sch. 1. *See* **SCA 1**, **SIA 1**, **SMA 2**, **SSA 1**, **SUA 1**

SMA 2 — standard agency agreement between a **Member** and his **members' agency** (often called by **self-regulators-at-Lloyd's** "the members' agent's agreement") at Byelaw 8 of 1988, Sch. 1. *See* **SCA 1**, **SIA 1**, **SMA 1**, **SSA 1**, **SUA 1**

Society of Lloyd's — a fictional name used to describe the **Corporation**, **Members** collectively, etc. *See* **Corporation**, **Corporation of Lloyd's**, **Lloyd's**

SOD — *Settlement Offer Document* (Lloyd's, July 30 1996) formally offering **RRC 1** and formally describing **RRCs 4, 5, 7, 17**, etc.; *also* **R&R 13**

solitary corporate Member — a **corporate Member** not part of an **ILV**

solus — an **individual SYA participant** personally and directly — *cf.* merely notionally or as a conduit to MO and or BO claims payment securitisation funds. *Cf.* **conduit effect**

Special Reserve TD — Special Reserve Trust Deed *And see* **New Special Reserve TF**

Special Reserve TF — the trust fund held under the **Special Reserve TD**

SPIL — a **SYA stamp's PIL**, *viz.*, the aggregated PILs of a particular SYA's individual participants. Often called "capacity"

spoastic — a (presently, necessarily corporate) **Member** who is the **sole participant on a SYA**

spoastic RTC — the type of **RTC** described in Byelaw 18 of 1994, Sch. 1, §1, definition of "reinsurance to close", §(f): "in the case of a syndicate consisting only of a single corporate member which is not closed by reinsurance to close by another person, the inclusion in the underwriting account of that syndicate for the next following year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing; and for the purposes of this byelaw, the amount representing such provision shall be treated as premium in respect of such reinsurance to close"

SR — syndicate return

SRFM — the **Corporation's** Special Reserve Fund Manual (Lloyd's, one volume, looseleaf)

SRM — Solvency and Reporting Manual (Lloyd's, looseleaf, various dates)

SRTD — Special Reserve Trust Deed

SSA 1 — standard sub-agency agreement between a **members' agency** and a **managing agency** at Byelaw 1 of 1985, Sch. 2

stamp — *see* **SYA stamp**

State Agreement — the July 11, 1996 agreement between: (1) the **Corporation**; (2) the participating State Securities Regulators. Apparently there are small but material substantive differences between the State Agreements in the case of certain US states. *Cf.* **NASAA Agreement**

statutory administration — administration under Insolvency Act 1986, Part II

stop loss — *see* **PSLI**

Strengthening Chain — *Strengthening Lloyd's Chain of Security — A Review* (Lloyd's, April 1997)

SUA 1 — standard agency agreement between a natural **Member** and a **managing agency** (often called by "Lloyd's" "the managing agent's agreement (general)") at Byelaw 8 of 1988, Sch. 3. *See* **SCA 1**, **SIA 1**, **SMA 1**, **SMA 2**, **SSA 1**

substitute — a type of **Corporation** affiliate like **annual subscriber**, **associate** and **Member**

SUM — Syndicate Underwriting Management Limited. Incorporated in England and Wales, June 18, 1985, number 1923481; a wholly owned subsidiary of the **Corporation**

SUP — the FSA's 'module' 'Supervision' (FSA, June 21, 2001 etc.)

Supervisory Management Agreement — *see* **RRC 2**

Swiss Agreement Decision — Council Decision 91/370/EEC (June 20, 1991) on the conclusion of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance

SYA — syndicate year of account; a syndicate's UY-specific accounting and collectivisation device, on which one or more **Members** deploy **PIL** in order to sell insurance. Sometimes abbreviated **at Lloyd's** to "YOA". A specific SYA is cited by syndicate number followed by UY, followed if appropriate by the SYA's relevant trading year. Thus "134-1988-IV" designates the fourth **YOR** (*viz.*, 1991) of syndicate 134's 1988 YA. *See* **SYA participant**, **SYA stamp** and **syndicate**

SYA-level separate contracts principle — the principle that every **SYA participant** has his own personal, individual, separate contract with each **assured-at-Lloyd's** and with each other person with whom the managing agency contracts on his behalf

SYA-level several liability rule — the rule that every **SYA participant** is liable only for his own **Participation Liabilities** and not those of any other Member. *Cf.* **Membership-level several liability principle**

SYA-level collectivisation rule — the rule that the managing agency of participants on a particular SYA collectivises their relevant affairs and must treat each all such **SYA participants** alike. *See* **syndicate-level aggregation**

SYA-level impenetrability rule — the rule that an **assured-at-Lloyd's** cannot communicate on any matter directly with any subscribing **SYA participant**

SYA-level passivity rule — the rule that a **SYA participant**, though in all contractual respects personally liable for his insurance business, must conduct every aspect of that business through a managing agency. *See* **SYA-level collectivisation rule**

SYA-level several liability rule — the rule that every **SYA participant's** SYA-level (*cf.* **Membership**) liabilities are several, not joint or joint-and-several. *Cf.* **Membership-level several liability principle**

SYA-level uniform front rule — the rule that in relation to third parties, especially including Lloyd's brokers, the managing agency of participants on a particular SYA makes no distinction between those participants for trading or any other purpose

SYA-level united front rule — *see* **SYA-level uniform front rule**

SYA participant — an **underwriting Member** deploying **PIL** on: (1) one particular SYA; (2) one or more particular SYAs; (3) SYAs generally; *cf.* **SYA stamp**. Includes where appropriate the trustees of a **SYA participant's** relevant premium sequestration trust funds (*see* for example **PTD-premium**). *See* **conduit effect**; **EquitasRe-reinsured SYA participant**; **EquitasRe-RTCed SYA participant**; *solus*

SYA stamp — (1) all the participants on a particular **poly-stamp**. *Cf.* **SYA participant**; **mono-stamp**. *See* **capacity**

syndicate — (1) a syndicate at Lloyd's; (2) an entrepreneurial idea in the mind of a managing agency; (3) a conceptual basis on which **SYAs** are self-regulated; (4) conceptually, the stem from which a **YA** buds in an **UY**. *See* **SYA** and **YA**; (5) a collection of **YAs**, or the **stamps** of particular **YAs**, of a particular **syndicate**

syndicate auditor — *see* **recognised accountant**

syndicate-level aggregation — a managing agency's practice of aggregating the finances and or affairs of participants on more than one YA of a particular syndicate. *See* **SYA-level collectivisation rule**

syndicate year of account — *see* **SYA**

T

TD — trust deed

TF — trust fund

Third Life Directive — Council Directive 92/96/EEC (November 10, 1992) on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC

Third Non-Life Directive — Council Directive 92/49/EEC (June 18, 1992) on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC

tiered PIL — PIL which self-regulatorily must be deployed on YAs of one particular syndicate or (depending on context) of particular syndicates. *Cf.* **free PIL**

Training Requirements 1998 — Training and Development Requirements attached to Reg. Bn. 2/99, January 20, 1999 ("Training and development byelaw and Training and Developments Requirements 1998")

Treasury — a UK government ministry

Treasury Sel. Comm. — House of Commons Treasury and Civil Service Committee. *See* **Treasury Sel. Comm. 1**

Treasury Sel. Comm. I — *Financial Services Regulation: Self-Regulation at Lloyd's of London*, House of Commons, Session 1994-95, Treasury and Civil Service Committee, Fifth Report (HMSO, May 17, 1995), principally comprising Volume I: Report; Volume II: Minutes of Evidence and Appendices (187-II). *And see* Minutes of Evidence Previously Unreported (HMSO, June 21, 1995; 549)

Treasury Sel. Comm. 1a — *Financial Services Regulation: Self-Regulation at Lloyd's of London, Minutes of Evidence Previously Unreported*, 26 January 1995, 6 March 1995, 13 March 1995 and 26 April 1995, House of Commons, Session 1994-5, Treasury and Civil Service Committee, (HMSO, June 21, 1995)

Treasury Sel. Comm. 1b — *The Government's Response to the Fifth Report from the Committee in Session 1994-95*, House of Commons, Session 1994-5, Treasury and Civil Service Committee, Fifth Special Report, July 19, 1995 (HMSO 745)

U

UK GAAP — UK Generally Accepted Accounting Principles. *Cf.* **US GAAP**

UM I, II, III — the Corporation's Underwriting Agents Manual (three volumes (in this book, "I", "II" and "III"), looseleaf)

umbrella broker — a non-Lloyd's broker acting under a registered umbrella arrangement provided by a host Lloyd's broker

umbrellee — an intermediary under an umbrella arrangement

unconsumed PIL — **deployed PIL** not actually consumed by actually or notionally received premium. *Cf.* **consumed PIL**

underwriting Member — (1) an 'underwriting member' as defined at Lloyd's Act 1982, s2(1); (2) a Member permitted to be a SYA participant

uniform front rule — *see* SYA-level uniform front rule

Unlimited-Liability Insurers CP — Unlimited Insurance companies — A consultation document (Treasury, April 2004)

US — United States

US Credit-for-Reinsurance Common-Use TD 1999 — *see* Lloyd's US Credit-for-Reinsurance Common-Use TD 1999

US Credit-for-Reinsurance Common-Use TF 1999 — *see* Lloyd's US Credit-for-Reinsurance Common-Use TF 1999

US Credit-for-Reinsurance Personal-Use TD 1999 — *see* Lloyd's US Credit-for-Reinsurance Personal-Use TD 1999

US Credit-for-Reinsurance Personal-Use TF 1999 — *see* US Credit-for-Reinsurance Personal-Use TF 1999

US GAAP — US Generally Accepted Accounting Principles. *Cf.* **UK GAAP**

US Surplus-Lines Common-Use TD 1999 — *see* Lloyd's US Surplus-Lines Common-Use TD 1999

US Surplus-Lines Common-Use TF 1999 — *see* Lloyd's US Surplus-Lines Common-Use TF 1999

US Surplus-Lines Personal-Use TD 1999 — *see* Lloyd's US Surplus-Lines Personal-Use TD 1999

US Surplus-Lines Personal-Use TF 1999 — *see* Lloyd's US Surplus-Lines Personal-Use TF 1999

USVI — US Virgin Islands

UY — underwriting year; the insurance equivalent of a financial year; presently the twelve months beginning January 1

V

Valuation of Liabilities Rules 2000 — *Valuation of liabilities for Lloyd's solvency purposes* (Lloyd's, 2000; at Mkt. Bn. Y2404, November 9, 2000 ("31 December 2000 solvency test: eligible assets and valuation of liabilities rules"), Annex 2). *See* **Conditions & Requirements: Solvency 2000**

Verification Form — verification form for **natural Members**

W

Walker CR — Report of an inquiry into Lloyd's syndicate participations and the LMX spiral (Lloyd's, June 1992)

Wilson notice — any public advertisement placed by a **SYA participant** or his personal representative (including his **insolvency guardian**) seeking to establish a FO connection with an **assured-at-Lloyd's**

working Member — a working member of **Lloyd's** as defined in Lloyd's Act 1982, s.2(1). *Cf.* **external Member**

Y

YA — year of account: not a time period; an accounting and collectivisation device emitted in a **UY** in relation to a **syndicate**. *See* **SYA**

YOR — a year of operation of a **SYA**, presently January 1 to December 31.

PREFACE

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PRELIMINARY

generally; relevant new law imminent

- P1** The present Edition aims to state English law as at January 2, 2004. Some later material has been included. Comments, corrections, suggestions and source material are welcome, will be accredited if requested and appropriate, and should be sent to the Author, whose coordinates can be found, together with various updating material, at www.astorlaw.com. A material quantity of new law specifically on solvency and insolvency at Lloyd's is imminent, such as (for example, respectively) that implementing CP 04/7 proposals (especially a new PRU chapter¹ on the

¹ See the draft at CP 04/7, Annex 8; and see *op. cit.*, §1.17.

Lloyd's enterprise intended to replace² parts of LLD), and that implementing³ the Reorganisation Directive specifically in relation to the Lloyd's enterprise. Lloyd's enterprise accounts for fye December 31, 2003 were published just in time to be noted in the text. Equitas Holdings Ltd. accounts for fye March 31, 2004, are due around August 2004.

topicality

scheming a 'syndicate'

- P2** A current London market talking point is the legal technology required to scheme a 'syndicate' in order to purge 'it' of certain inconvenient insurance contractual liabilities (the affected assured-at-Lloyd's may like to know that his undischarged insurance contract is now a 'legacy issue'), including where no convenient source of conventional outward-RTC⁴ therefor is immediately available. The present work's description of certain fundamentals of insolvency at Lloyd's and at Equitas Re may prove helpful in such an exercise (the particulars of which we do not anticipate), including by indicating⁵ why a syndicate has no assets or (insurance contractual or any other) liabilities capable of being schemed.

other specifics

- P3** Further affirming this work's topicality are five recent germane events and one continuing germane non-event: (1) publication (March 8, 2004) of *Penrose*, evidencing continuing UK insurance regulatory infelicities of exactly the kind which appear to have underlaid the Lloyd's enterprise's near-collapse in 1996. Equitable Life sharing various structural, transactional, financial, administrative, procedural, commercial, social, cultural and regulatory infelicities with the Lloyd's enterprise, quantities of *Penrose* apply word for word to the present Lloyd's enterprise and its present regulation; (2) apparent filing (apparently March 29, 2004, in US District Court for the Eastern District of New York) of the Farmer-Paellmann African-American slavery reparations suit against the Corporation (we have not seen the Complaint); (3) publication (April 2004) of the Treasury's *Unlimited Insurance companies — A consultation document* on some unlimited-liability⁶ insurance enterprises; (4) publication (April 30, 2004) of the FSA's consultation paper CP 04/7, *Lloyd's: integrated prudential requirements, and changes to auditing and actuarial requirements Including feedback on CP178*; (5) apparent failure *pro tem.* in the US Senate of Bill S.2290 on asbestos litigation reform (an issue also to be considered in the House: Bill H.R.1114); (6) non-publication of the Treasury's chronically imminent consultation paper⁷ on how it proposes to implement the Reorganisation Directive in relation to the Lloyd's enterprise. The Author and Publisher gave up waiting for it for this Edition. It is also right to mention the curious remark of Morison J in *Tonicstar Ltd. (operating as Lloyd's Syndicate 1861) v American Home Assurance Co.* [2004] All ER (D) 400 (May), viz., "it is well established that a reinsurance to close is no more than a reinsurance of the Names for the old year by the

² See CP 04/7, §1.18 *et seq.*

³ See ¶P13 *et seq.*

⁴ See recent discussions such as Chairman's Strategy Group-derived thinking on SYA stamp accounts in run-off.

⁵ See ¶2.115.

⁶ There appears to be no rational reason for the omission of 'liability' in the title of *op. cit.*

⁷ See ¶P12.

Names for the succeeding new year *Toomey v Eagle Star* [1994] 1 LLR 516".⁸ It is hoped that thorough judicial FO-MO-BO™-based analysis will eventually produce a result in accord with the Author's, *viz.*, that conventional RTC in BBSN circumstances (*a fortiori* in not-BBSN circumstances) has — indeed, can have — nothing whatever to do with reinsurance.

intended readership

- P4** This work is directed to the specialist practitioner for whom relevant canards⁹ need no demythologising; to whom the Lloyd's enterprise, the business of insurance at Lloyd's, and relevant contractual, trust and other instruments, need no introduction; and for whom there is no substitute, however detailed the textbook, for all current relevant primary source material (and a source ready and willing to provide it at short notice) — from which it will be realised that the present work's main purpose is to put the reader on notice and on inquiry concerning the provisions of some of the documents with which he should already be familiar.

scope

Chapters

- P5** Quantities of relevant material, all graphics and tables, and many of the Author's ruminations on relevant highly technical legal points, have had to be excised for space reasons. A more detailed and compendious Second Edition is already in preparation. The present Edition has had to be confined to providing a preliminary, cursory, highly simplified, non-exhaustive, summary orientation to the subject. The latest version (v.03.0) of the Author's Master Glossary is reproduced in full for convenience. Chapter 1 ('The Regulatory Environment') summarises UK external insurance solvency regulation of the Lloyd's enterprise as a whole (*cf.* its various relevant components such as the Corporation, SYA participants, managing agencies and Lloyd's brokers). That part of the Chapter dealing with the Lloyd's enterprise treats LLD, Ch. 11 ('Required margins of solvency'), taking account of the FSA's recent temporary amendments thereto implementing the Non-Life Solvency Directive.¹⁰ It notes, but does not discuss, the FSA's Enhanced Capital Requirements as proposed in CP 04/7. An exegesis of LLD as a whole (or of other relevant FSA

⁸ For criticism of a similar approach to conventional RTC, see the present work, p.A15 *et seq.*

⁹ *Viz.*, that (for example) there are relevant entities properly "Society of Lloyd's", "Corporation of Lloyd's", or "Lloyd's of London"; Lloyd's is an insurance market; Lloyd's sells insurance; a syndicate sells insurance; syndicate members or participants sell insurance; a SYA sells insurance; a syndicate has members or participants; a syndicate is an annual venture or is reconstituted annually; 'three-year accounting' is principally about accounting; a Member provides capital to, or invests in, Lloyd's or a syndicate; a corporate SYA participant sells insurance with limited liability; PIL is necessarily indexed to liability; a SYA participant has a 'share' of 'syndicate' liabilities; a Member's FAL are necessarily indexed to the totality of his SYA-level insurance liabilities; called cash is necessarily used to pay claims; the terms of an insurance contract sold at Lloyd's are exhaustive or definitive as to how that contract is required by self-regulators-at-Lloyd's to be performed by SYA participants; conventional RTC is a type of reinsurance; conventional RTC closes UYs; 'syndicate staff' or 'box staff', including the active underwriter, are not managing agency staff; the 'chain of security' has four links in practice (*viz.*, the Central Fund is used only when all other funds have been exhausted); the purported NCFB, §§8(3)(b) and or 8(4)(b) 'ringfencing' is effective to protect Members from EquitasRe-reinsured liabilities; Lloyd's has self-regulatory powers in its own right; any component of the Lloyd's enterprise, including Lloyd's, is immune from suit; Lloyd's byelaws are subordinate legislation; the Lloyd's broker is exclusively the assured's-at-Lloyd's agent; Equitas Re is an assumption reinsurer because it is a run-off agent, etc.

¹⁰ See ¶1.12.

regulation) is outside this work's scope.¹¹ Part of the Chapter deals with certain financial structural fundamentals at *Equitas Re*.

- P6** Enterprise-level insurance-regulatory solvency is only one aspect of insolvency at Lloyd's. Chapter 2 ("Insolvency at Lloyd's") discusses principles applicable to insolvency of or in relation to some particular relevant components of the Lloyd's enterprise — including, most importantly in the insurance context, the SYA participant (as *solus* and as conduit), the Corporation, and the Member — and some of the specific insolvency processes to which each might be subjected. Discussion of the insolvency of the members' agency, managing agency, active underwriter, Lloyd's broker, coverholder, run-off company, and assured-at-Lloyd's will probably be restored in the Second Edition.
- P7** Chapter 3 ('Insolvency at *Equitas Re* and *Equitas Ltd.*' — substantially a reprint of the relevant chapter in *Astor's Equitas Re Handbook*) does similarly in relation to *Equitas Re* and *Equitas Ltd.*; *Equitas Re* merely reinsures liabilities which have never left the Lloyd's enterprise, the return of which to the enterprise's balance sheet could have an adverse effect on its solvency. Chapter 4 ('Claims Payment Securitisation Funds and Insolvency') touches, in the insolvency context, on a selection of relevant MO and BO, PU and CU, dedicated and not-dedicated, expressly and arguably available claims payment securitisation trust and other funds at Lloyd's including the Central Fund. As anyone knows who has attempted to study such funds' governing instruments in detail, they are not susceptible to summary description of any value. They are discussed in the detail required elsewhere.¹² The contents of Appendix I are referred to elsewhere.¹³ Appendix II reproduces certain primary and secondary legislation plus the full text of the Reorganisation Directive. Appendix III reproduces a few key provisions from OCFB and NCFB.

some insolvency-relevant and other matters not considered

- P8** The present work makes no attempt to recount general insurance, insolvency or insurance insolvency law or practice, or to repeat any of the detailed exegeses on the Lloyd's enterprise — especially including those concerning recourse, finances and financial processes in BBSN circumstances — and *Equitas Re* to be found in, and to that extent is to be read in conjunction with, *Astor's Law of Lloyd's*, 2nd Ed. and *Astor's Equitas Re Handbook*, each of which treats many relevant matters *in extenso*. It also emphasises concepts and principles over practice: how some of the matters treated end up in practice is intended to be further elucidated in subsequent Editions. It does not discuss numbers (whether in published audited accounts or speculatively), or specific types of transaction, likely to give rise to insolvency in the first place. It is not to be construed as conveying any opinion on the solvency of any component of or participant in the Lloyd's enterprise.
- P9** Also omitted are various insolvency-relevant matters arising peculiarly at or in relation to Lloyd's such as (for example) discussion of the FSA's recent CP 04/7 on capital adequacy at Lloyd's (subsequent Editions of this work will take into account relevant new law); insolvency-relevant insurance and reinsurance wordings in insurance contracts made at Lloyd's; solvency issues arising particularly in relation to life products sold at Lloyd's; relevant procedural or substantive inter-jurisdictional

¹¹ For a more comprehensive discussion, see *Astor's Law of Lloyd's*, 2nd Ed.

¹² At *Astor's Law of Lloyd's*, 2nd Ed.

¹³ See ¶P20.

matters such as (for example) financial recalibration processes as they may bear particularly on foreign corporate SYA participants; accounting rules and practices concerning insurance business at Lloyd's; claims payment securitisation regimes in Australia, Canada, Illinois, Kentucky, South Africa and USVI; the particular position of SYA participants and assureds-at-Lloyd's in US federal and state law; and insurance (erroneously called reinsurance) of the Central Fund. It is particularly regretted that there was no room in this Edition for a discussion of US state insurance regulatory matters, including at the level of the National Association of Insurance Commissioners, but a thorough treatment, including mandated minimum trust fund levels (including their practice and politics), will be found in this work's Second Edition. As for source material (regardless of its particular subject), some — such (for example) self-regulatory emissions of the Lloyd's enterprise (which are now, in the Author's view, completely out of control in both quantity and quality) — have had to be cited very parsimoniously or excluded altogether from the present exploratory Edition. Subsequent editions may be more compendious depending on demand. It is no part of this Edition's brief to deal with Scots law (including concerning the Scottish limited partnership), or with tax. Care has been taken to not analogise financial protection and recalibration processes capable of arising at Lloyd's or Equitas Re to any of the particular UK conventional insurance companies presently in financial difficulty.

some distinctions not treated

P10 Nor does the present work labour fundamental distinctions — without an appreciation of which any investigation of the Lloyd's enterprise would be pointless — such as between (for example): (1) regulation: self-regulation at Lloyd's and external insurance regulation; external insurance regulation and external financial-protection regulation; generally applicable insurance law and that which happens to specially treat reinsurance and or reinsurers; *ditto* and the Lloyd's enterprise; (2) insolvency: general insolvency and insurance regulatory insolvency; general creditors and insurance creditors; insolvency of the insured and of the insurer; insolvency of the insurer and of a third-party service provider (such as the Corporation, members' agency, managing agency, Lloyd's broker or run-off agent); generally applicable insolvency law and that which happens to apply expressly and specifically to sellers of insurance¹⁴ or reinsurance,¹⁵ to the Corporation,¹⁶ and or to Members;¹⁷ (3) the Lloyd's enterprise structurally: the Member individually and Members collectively; Members collectively and the Corporation; the non-underwriting, not-underwriting and underwriting Member; the external and working Member; the natural and corporate Member; the Member and the SYA participant; (4) insurance business at Lloyd's: the FO, MO and BO at Lloyd's; activities directly relating to specific insurance transactions and activities of a more general financial-services nature (such as mere SYA participation); a syndicate, a SYA, a SYA stamp, and a SYA participant; a SYA, a UY, and a YOR; a cash call and the transaction giving rise to it; reinsurance and RTC; conventional and other species of RTC; (5) liability at Lloyd's:

¹⁴ See for example Insurers Winding Up Rules; Reorganisation Directive; Reorganisation Regulations, etc.

¹⁵ See for example Reorganisation Regulations, §2(1), definition of 'UK insurer'; Insurance (Fees) Regulations 2001 (SI 2001/812), §3, definition of 'pure reinsurer'; IPRU(INS), §11.1, definition of "pure reinsurer"; FSA Glossary, definition of "pure reinsurer", etc.

¹⁶ See for example LLD, *passim*.

¹⁷ See for example Reorganisation Regulations, §3. The distinction is presumably directed not to Members but to SYA participants. Mere Members have no insurance liabilities (*cf.* Member-level liabilities — for example, to contribute to the Central Fund).

Member- and SYA-level (several) liability; liability to make several-liability contributions to PU and CU, SYA-level and Member-level claims payment securitisation funds; limited assets and (un)limited liability;¹⁸ liability and its quantum; quantum and exposure to that quantum; containing¹⁹ and reducing²⁰ exposed-to quantum; liability of a person and of his or its contributories; intra- and extra-Lloyd's-enterprise assets and liabilities of the Member or SYA participant; (6) run-off at Lloyd's: run-off of the insurance liabilities of an insurance company (whether or not in run-off) and of the collectivised insurance liabilities of a particular SYA stamp²¹ (whether or not in run-off); the activity of 'running off'²² and the state of being 'in run off'; (7) collection: coverage and collection; collection and execution; the SYA participant as conduit and as *solus*; the not-yet conventionally outward-RTCed *originalis* and the conventionally outward-RTCed *originalis*; the *originalis* and various generations of conventionally inward-RTCing SYA participant; the intermediate inward-RTCing SYA participant and the latest inward-RTCing SYA participant; claims payment securitisation funds which are PU and CU, dedicated and not-dedicated, and expressly and arguably available; (8) other: the Lloyd's enterprise and London company market entities; Equitas Re as principal and as agent; Equitas Re's resources or inclination to pay EquitasRe-reinsured liabilities and the Golden Rule. Such distinctions are treated elsewhere.²³

technical terms; case citations

- P11** Certain technical terms are defined in the periodically updated²⁴ Master Glossary (which also defines terms used in *Astor's Law of Lloyd's, 2nd Ed.*, *Astor's Equitas Re Handbook* and the Author's relevant other writings on the Lloyd's and Equitas enterprises). This work sometimes uses 'plaintiff', increasingly unfamiliar to English lawyers, where a distinction is required between the initiator of litigation ('claimant'²⁵) and an assured-at-Lloyd's with an alleged loss under his insurance contract ('claimant'). Terms rendered *italically* in FSA emissions are in this work rendered (not exclusively²⁶) in plain text within editorially added double (") quote marks. In case citations, the erroneous "Society of Lloyd's" is usually editorially corrected to "Lloyd's".

REGULATORILY

the FSA

regulatory infelicities

- P12** Self-regulation at Lloyd's²⁷ must now be read in the context of FSMA 2000, Part XIX and relevant FSA material. It is expressing it generously, in relation to relevant

¹⁸ For example the canard that a corporate SYA participant which happens (like a natural SYA participant) to have limited assets (or limited recourse to limited-liability contributories) trades with limited liability.

¹⁹ For example, by outward reinsurance or PSLI.

²⁰ For example, by contractual amendment, or settlement, with the assured.

²¹ In BBSN circumstances, necessarily always solvent with Golden Rule entitlement.

²² The Author is obliged to the Member who authoritatively informed him that 'run off' meant that the managing agency had run off with the money.

²³ *Viz.*, in *Astor's Law of Lloyd's, 2nd Ed.* and *Astor's Equitas Re Handbook*.

²⁴ See www.astorlaw.com.

²⁵ See CPR.

²⁶ Quotes or names containing an apostrophe are often placed in double quote marks.

²⁷ Self-regulators-at-Lloyd's appear to have had a comfortable ride in *Jaffray* {2a} [2000] All ER (D) 1674 (Cresswell J) and {2b} [2002] EWCA Civ. 1101 (CA, affirming on different grounds), which they now

FSA regulatory material, to say that an insurance regime more jejunely conceived or more gauchely²⁸ expressed would be difficult to find. It did not seem likely or possible that the pre-FSMA 2000 external insurance regulatory regime could, should or would have been merely recast — to the extent that it *is* cast²⁹ — in an even more obscure,³⁰ prolix,³¹ incompetently drafted,³² dysfunctionally excrescent³³ form, but the FSA has done it.

appear to be taking full advantage of: see for example *Sphere Drake Insurance Ltd. v Euro International Underwriting Ltd.* [2003] EWHC 1636 (Comm), [2003] All ER (D) 160 (Jul) (Thomas J):-

517. The letter concluded by stating that they had written to Lloyd's, urging that a full investigation be made into the manner in which this class of business had been written. Enquiries were made by Lloyd's into the conduct of the participants in the 1993 spiral. At my request information was sought from Lloyd's on 9 April 2002; Lloyd's confirmed, in a letter to Clyde & Co on 23 April 2002, that there had been an enquiry, though the DTI were not advised of it. As there was no further information from Lloyd's, at my request Clyde & Co wrote to the Chairman of Lloyd's on 9 July 2002, asking for more information about the enquiries. Lloyd's asked for the expert reports in these proceedings; these were supplied on 10 October 2002. Lloyd's never responded. They neither assisted the Court by making available any information about the enquiry, nor by making available the documents or other information obtained by the enquiry; they also offered no explanation as to why they were unable to assist. I very much regret their failure to respond to the Court's request for assistance. I have had to reach conclusions about a market in which many syndicates participated without the benefit of any assistance from Lloyd's as a regulator in that market, even though they had conducted their own enquiry into the said market.

²⁸ See for example much so-called FSA guidance (marked 'G'). (The FSA's regulatory use of *toy town* and *big ears* (with or without accurate definitions), and promulgation of an interim colouring-in sourcebook-block-module with crayons — preceded by one or more consultation papers and policy statements — is presumably a matter of time.)

²⁹ For example, the FSA proposes to withdraw IPRU(INS), and proposes to move some material specific to the Lloyd's enterprise out of LLD to PRU: see recently for example CP 04/7, §1.18:-

We intend that when it becomes effective for Lloyd's, PRU should replace much of the material currently contained in LLD. We will consult later this year on the withdrawal of some LLD material, consistent with our withdrawal of the Interim Prudential Sourcebook for Insurers (IPRU(INS)).

³⁰ For example, not all FSA regulation peculiar to the Lloyd's enterprise is in one place (and CP 04/7 proposes to disperse it further: see for example *ibid.*, §§1.6, 1.18); FSA Glossary definitions are either absent ('Society of Lloyd's') or erroneous ('Society', 'syndicate', 'syndicate year'), etc.

³¹ See for example the multiple definitions of particular terms in FSMA 2000, in FSA Glossary, in IPRU(INS), §11.1, and in relevant other instruments; and see FSA's various 'G' attempts at didacticism.

³² LLD, §3.2.1G is a good illustration (for example, it is not the obligation the FSA apparently thinks it is (on which see ¶P12(8)); apparently pointless distinction between "policyholders" *simpliciter* and "Lloyd's policyholders"). FSA use and non-use of terms and definitions is egregious. For example: (1) 'Society of Lloyd's' (no such entity; not defined in FSA Glossary); (2) 'Society' (conceptually and terminologically erroneous to begin with) erroneously defined in FSA Glossary to mean an unauthorised "insurer" (the Corporation is not an insurer) — and see FSA's inconsistent use of 'Society' to mean Members collectively (as at CP 16 solvency, §4: 'the Society as a whole (ie, "the association of underwriters known as Lloyd's")'); (3) use in LLD of 'member' tautologously when with Corporation-associated nouns and pronouns; (4) failure in LLD, *passim*, to distinguish competently between Member and SYA participant; (5) use of 'syndicate year' to mean a SYA (which is not a time period); (6) incoherent use of "Lloyd's", as in (for example) LLD, §11.1.3G ("Lloyd's as a whole" — it is not clear what 'the Corporation as a whole' is intended to refer to; if to Members collectively, presumably by the time it drafted *ibid.*, §11.1.3G the FSA realised its CP 16 solvency, §4 error, and thereafter should have used some phrase such as (for example) "members" collectively, or (where appropriate) 'SYA participants collectively').

³³ For example, it is singular that the FSA has, recently, taken no fewer than three CPs (CPs 178, 184 and 04/7) to deal with the simple matter of fully implementing the Non-Life Solvency Directive in relation to the Lloyd's enterprise, and that it now proposes to remove Lloyd's-enterprise-specific provisions from LLD, Ch. 11 and put them in PRU (see for example CP 04/7, §1.18). Concerning FSA regulation itself, consider such instruments presenting themselves for compliance by the regulatee as (for example (the following were taken on April 18, 2004 from the website page http://www.fsa.gov.uk/handbook/by_module.html 'last updated 24/12/2002': the difference between a FSA 'module' and a 'block' is not immediately apparent): (1) from the 'High Level Standards' 'block': 'Principles for Businesses' ('PRIN'); 'Senior Management Arrangements, Systems and Controls' ('SYSC'); 'Threshold Conditions' ('COND'); 'Statements of Principle and Code of Practice for Approved Persons' ('APER'); 'The Fit and Proper Test for Approved Persons' ('FIT'); 'General Provisions' ('GEN'); (2) from the 'Business Standards' 'block': 'Interim Prudential Sourcebook for Banks' ('IPRU'); 'Interim Prudential Sourcebook for Building Societies';

- P13** FSA has remarked: 'Our aim is that the prudential supervision regime for Lloyd's should be at the leading edge of insurance regulation internationally.'³⁴ Even were the FSA technically competent procedurally — which it is not — it apparently does not understand, or cannot articulate, elementary relevant substance. For example,³⁵ it: (1) errs concerning the Corporation's name,³⁶ true legal nature,³⁷ and self-regulatory functions.³⁸ Even when regulatorily using the bogus phrase "Society of Lloyd's" (regulatory use of which appears to be proof of material multiple technical misunderstanding), the FSA fails³⁹ to define it (presumably intentionally). LLD, §2.6.2G evidences that the FSA does not understand the difference between the Council⁴⁰ and the Corporation;⁴¹ (2) erroneously⁴² considers Lloyd's to be a market; (3) treats the Corporation as an "insurer"⁴³ inconsistently with the Corporation's

'Interim Prudential Sourcebook for Friendly Societies'; 'Interim Prudential Sourcebook for Insurers' (IPRU(INS)); 'Interim Prudential Sourcebook for Investment Businesses'; 'Integrated Prudential Sourcebook' ('PRU', formerly 'PRAG'); 'Conduct of Business' ('COB'); 'Insurance: Conduct of Business' ('ICOB'); 'Mortgages: Conduct of Business' ('MCOB'); 'Client Assets' ('CASS'); 'Market Conduct' ('MAR'); 'Training and Competence' ('TC'); 'Money Laundering' ('ML'); (3) from the 'Regulatory Processes' block: 'Authorisation' ('AUTH'); 'Supervision' ('SUP'); 'Enforcement' ('ENF'); 'Decision Making' ('DEC'); (4) from the 'Redress' block: 'Dispute Resolution: Complaints' ('DISP'); 'Compensation' ('COMP'); 'Complaints Against the FSA' ('COAF'); (5) from the 'Specialist Sourcebooks' block: 'Collective Investment Schemes'; ('CIS'); 'New Collective Investment Schemes'; ('COLL'); 'Credit Unions' ('CRED'); 'Electronic Commerce Directive' ('ECO'); 'Electronic Money' ('ELM'); 'Lloyd's' ('LLD'); 'Professional Firms' ('PROF'); 'Recognised Investment Exchanges and Recognised Clearing Houses' ('REC'); 'United Kingdom Listing Authority' ('UKLA'); (6) from the 'Special Guides' block: 'Energy Market Participants' ('EMPS'); 'Small Friendly Societies' ('FREN'); 'Oil Market Participants' ('OMPS'); 'Service Companies' ('SERV'); (7) FSA Glossary — which is not even the only glossary: see for example the substantially duplicative IPRU(INS), §11.1. But this is a mere fraction of the present regulatory regime: see also the excrement of relevant statutory instruments. See also the torrent of choreatic preliminary FSA emissions such as (for example, in the context of the Lloyd's enterprise alone) CPs 16, 16 solvency, 48, 66, 140, 177, 178, 181, 184 and 04/7 (with no doubt more to follow), and PSs 16, 16 return, 48, 66, 177, 178 and 181 (with no doubt more to follow). Even if the FSA exhibited above-average substantive and/or procedural regulatory ability — which it does not — its methodology is a public scandal.

³⁴ CP 16, §90.

³⁵ Numerous other examples will be found in Chapter 1, etc.

³⁶ See ¶2.16.

³⁷ The FSA persists as at the date of this Preface in asserting, and conceivably believing, that the Corporation is a society. See for example LLD, *passim*, and FSA Glossary, use of "Society of Lloyd's" (curiously, not defined) and definition and use of "Society" ('the society incorporated by Lloyd's Act 1871 by the name of Lloyd's.'). The Corporation is a person, not a society. It is immediately obvious that 'Society' *simpliciter* as used in Lloyd's Acts 1871-1982 (see Lloyd's Act 1871, s.3 etc.) is conceptually and legally erroneous. The FSA's definition itself appears to be mere regurgitation of the form of words adopted by self-regulators-at-Lloyd's at the time of R&R (see for example parties in various RRCs).

³⁸ See for example LLD, Chapter 1 ('Society's regulatory functions'), *passim*; FSA Glossary, definition of "Society's regulatory functions" (*viz.*, 'the "Society"'s powers, duties or functions in relation to "members" or "underwriting agents" which are or may be exercised for the purposes of supervising or regulating the market at Lloyd's.'): the Corporation has no supervisory or regulatory powers, duties or functions in its own right: see the relevant parts of Lloyd's Acts 1871-1982, especially Lloyd's Act 1982, s.6(1)-(2). The FSA's confusion, or inability to express itself clearly and correctly, is especially seen at LLD, §1.1.2G ('The "guidance" in this chapter is intended to: (1) promote confidence in the market at Lloyd's by ensuring that it is appropriately and effectively regulated by the "Society" and the "Council" and those to whom the "Council" delegates the Society's "regulatory functions"....'). *Ibid.*, §1.2.1G is incoherent.

³⁹ "Society of Lloyd's" is not defined in FSA Glossary or at IPRU(INS), §11.1.

⁴⁰ See for example Lloyd's Act 1982, s.3.

⁴¹ See for example Lloyd's Act 1871, s.3.

⁴² See for example CP 177, §2.2 ('Lloyd's is an insurance market, not a single insurance company'). In reality, the Corporation is not a market of any kind. There appears to be no conceptual, linguistic, intellectual or other obstacle to using some phrase such as "the insurance market at Lloyd's".

⁴³ See ¶1.3.

statutory⁴⁴ and apparent⁴⁵ FSA authorisation (and with the facts: the Corporation does not sell insurance), and apparently⁴⁶ inconsistently with the definition of 'insurer' for purposes of FSMA 2000, Part XXIV ('Insolvency'). The FSA's bald power⁴⁷ to apply to the court under Insolvency Act 1986, s.221 for an order winding up the Corporation appears to be a FSA drafting error;⁴⁸ (4) errs⁴⁹ terminologically, conceptually and substantively concerning a syndicate, a SYA and a SYA stamp.⁵⁰ The FSA's attempts to wrestle with a YA — "syndicate year"⁵¹ and now "syndicate period"⁵² — evidence profound misunderstanding and ignorance of elementary market practice; (5) errs⁵³ concerning, or has chosen to not articulate, the distinction between Membership and SYA participation; (6) appears⁵⁴ to be under, or has decided to foster, the misconception that every insurance contract made at Lloyd's is evidenced by a Lloyd's policy; (7) fails to make unambiguous whether the Corporation's personal liabilities include SYA participants' insurance liabilities; (8) appears⁵⁵ to believe that LLD, §3.2.1G is a rule (and continues,⁵⁶ for no apparent reason, to fail to promulgate the appropriate actual rule).

⁴⁴ See FSMA 2000, s.315.

⁴⁵ The "insurer" anomaly cannot be clarified because the FSA website register entry for the Corporation does not specify (to the apparent surprise of a relevant senior FSA official) its precise FSMA 2000, Part IV permissions. All the more curious given the Lloyd's enterprise's representations in its April 2004 new publicity campaign, "Lloyd's is authorised under the Financial Services and Markets Act 2000."

⁴⁶ See Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001, §2 read with Regulated Activities Order 2001, §10 read with FSMA 2000, s.315(2), etc.

⁴⁷ See ¶2.155.

⁴⁸ The position may change under the Reorganisation Directive as implemented in relation to the Lloyd's enterprise.

⁴⁹ See for example FSA Glossary, definitions of "syndicate" and "syndicate year". There appears to be no such thing at Lloyd's as a "syndicate year" *simpliciter*.

⁵⁰ All three are treated, and distinguished, in detail in *Astor's Law of Lloyd's*, 2nd Ed.

⁵¹ See FSA Glossary, etc.

⁵² See for example CP 04/7, Annex 8, second unnumbered page ('Managing agents are also subject to some rules for PRU category 2 firms in relation to the insurance business that they manage on behalf of members of Lloyd's. Those rules apply to managing agents in respect of the insurance business of each syndicate period that they manage in accordance with PRU 7.7.9R'). That a managing agency manages a period (even assuming that 'syndicate period' be a conceptually or substantively accurate term, which it is not) is a novel proposition.

⁵³ See for example FSA Glossary's definition of "member". And see LLD use (including at, for example, *ibid.*, Ch. 11, especially *ibid.*, §11.4) of "member" where 'SYA participant' is intended. The failure leads to comprehensive confusion: see for example FSA use of the phrase "member's margin".

⁵⁴ See FSA Glossary, definition of "Lloyd's policy" ('a "contract of insurance" written at Lloyd's').

⁵⁵ See (for example) the pre-PS 177 version of LLD, §3.2.1G (note the 'G', on which see GEN §§2.1.6G, 2.2.2G; *Readers Guide*, §18-32, etc.; italics added): 'The Society *should seek* to ensure that the Central Fund provides protection for policyholders at least equivalent to that available to other policyholders under the compensation scheme.' Italics added. The intellectual process by which the FSA has formed and adheres to the view that the letter 'G' is the letter 'R', and that the words 'should seek' are prescriptive, is presently obscure (perhaps it is explained in a consultation paper or policy statement). For the FSA's (patently false) claim that that version of §3.2.1G was a rule, see for example CP 177, §2.7 ('The FSA *requires* Lloyd's to ensure that the Central Fund arrangements at least match the protection for other policyholders under the FSCS'; italics added); *ibid.*, §2.10 ('Chapter 3 of the Lloyd's Sourcebook currently *requires* the Society to ... ensure that the Central Fund provides protection for policyholders at least equivalent to that available to non-Lloyd's policyholders under the FSCS').

⁵⁶ See the current version of LLD, §3.2.1G (release 25, January 2004; note the continuing 'G'; italics added): 'The Society *should seek* to ensure that the Central Fund provides protection for policyholders so as to minimise the need for Lloyd's policyholders to have recourse to the compensation scheme.' The inconsistent 'policyholders' *simpliciter* and 'Lloyd's policyholders' appears to be mere bad drafting.

reticence on important issues

P14 Certain issues on which a conscientious regulator genuinely intent on ensuring that valid-claimant assureds-at-Lloyd's obtain full value⁵⁷ would already have expressed itself candidly and helpfully appear to continue to '[go] unremarked'⁵⁸ by the FSA — without apparent good⁵⁹ reason — such as (for example):-

(1) Equitas Re's insistent asseveration to EquitasRe-assureds-at-Lloyd's, in claimant settlement negotiations, of its own imminent insolvency,⁶⁰ apparently thereby leading many a credulous US lawyer to advise and procure his client to settle prematurely and unnecessarily cheaply at St. Mary Axe in ignorance of

(2) the Golden Rule, non-disclosure of which by the Lloyd's enterprise and self-regulators-at-Lloyd's — in ignorance of which valid-claimant EquitasRe-assureds-at-Lloyd's continue to leave material sums on the table at St Mary Axe — the FSA does not appear to have yet addressed.⁶¹ It will be interesting to see whether the FSA will require Lloyd's brokers to disclose to their clients the Golden Rule's existence and detailed operation in order to prevent any valid-claimant client assured-at-Lloyd's misdirectedly settling prematurely and unnecessarily cheaply either at Lloyd's or, *a fortiori*, with outward reinsurers (such as Equitas Re, though self-averredly unconnected to the Lloyd's enterprise). Curiously, no Lloyd's broker appears to have yet been sued by a valid-claimant short-changed EquitasRe-assured-at-Lloyd's client for actionable broking of a valid claim at Equitas Re, or for deliberate or negligent non-disclosure of the practical particulars of the very principle on which the client was induced to buy insurance at Lloyd's in the first place;

(3) the *vires* of New Central Fund Byelaw, §§8(3)(b) and 8(4)(b), especially since the FSA is required⁶² to review all byelaws for procedural and substantive infelicitities;

(4) the still secret Notices of Requirements promulgated by the DTI in March 1996 in relation to Equitas Re and Equitas Ltd.⁶³ If they were innocuous, the FSA, which apparently⁶⁴ now calls them 'scope of permission' notices, would presumably have disclosed them. Transparent insurance regulation, and the plain dealing to which the FSA's draftsman appears so ingenuously to aspire, require their disclosure. The Requirements perhaps relate to Members' unlimited liability if Equitas Re becomes insolvent — which may be of interest to Members, some of whom enjoy the misapprehension that NCFB, §8(4)(b) is unimpeachable.

⁵⁷ On the FSA's relevant statutory 'objectives', see (for example) FSMA 2000, s.5 ('The protection of consumers').

⁵⁸ *Penrose* 552, on regulatory sloppiness in relation to Equitable Life.

⁵⁹ Presumably the fear of undermining misplaced public confidence is one of many reasons: see *Penrose*, 551.

⁶⁰ On the FSA's relevant statutory 'objectives', see (for example) FSMA 2000, s.5(2)(a).

⁶¹ On the FSA's relevant statutory 'objectives', see (for example) FSMA 2000, s.5 ('The protection of consumers'), especially *ibid.*, s.5(2)(c) ('the needs that consumers may have for advice and accurate information'). And see (for example) Third Life Directive, Annex II ('Information for policy-holders').

⁶² See Financial Services and Markets Act 2000, s.314(1) ('The Authority must keep itself informed about — (a) the way in which the Council supervises and regulates the market at Lloyd's...[.]'). And see LLD, §2.6 ('Information about the Society's byelaws').

⁶³ On the FSA's relevant statutory 'objective', see (for example) FSMA 2000, s.5 ('The protection of consumers').

⁶⁴ FSA source.

the Treasury's implementation of the Reorganisation Directive
tardy CP

- P15** The Reorganisation Directive does not apply to an individual SYA participant, who is not considered by relevant EU law to be an 'insurance undertaking'.⁶⁵ It already does directly apply to whatever the EU means by "the association of underwriters known as Lloyd's",⁶⁶ but fails to deal with any of the Lloyd's enterprise's relevant peculiarities, perhaps because the European Commission, already apparently⁶⁷ not entirely clear on the enterprise, does not know how to do it. The present Edition reproduces⁶⁸ the directive's official (and linguistically defective⁶⁹) English version at Appendix II but makes no substantive comment thereon pending UK implementation (already actionably tardy⁷⁰) of the directive specifically⁷¹ in relation to the Lloyd's enterprise,⁷² the eventual legislation likely to furnish copious material for a Second Edition.⁷³

⁶⁵ See Reorganisation Directive, §1.1 read with *ibid.* §2(a) and First Non-Life Directive, §8(1)(a) and First Life Directive, §8(1)(a).

⁶⁶ See Reorganisation Directive, §1.1 read with *ibid.* §2(a) and First Non-Life Directive, §8(1)(a) and First Life Directive, §8(1)(a).

⁶⁷ See ¶1.4.

⁶⁸ At Appendix II.

⁶⁹ For example, 'affectation of assets' (*op. cit.*, recital, §(15)); 'lawsuit pending' (recital, §26); 'the general rule of this Directive' (recital, §26); 'indefinite assets' (§20.1). Recital, §(18) is incoherent. See also the erroneous use, *op. cit.*, *passim*, of the word 'the': see for example 'the withdrawal of the authorisation' (recital, §(19)), 'the assets representing the technical provisions' (recital, §(16)); 'the authorisation' (*op. cit.*, §§13 heading and 13.1; *cf.* uses of 'the' at *ibid.*, §13.2).

⁷⁰ Reorganisation Directive, §31.1 (deadline of April 20, 2003). See *Insurance Day*, February 5, 2004 ('Treasury admits that Lloyd's is cause of EC insolvency warning').

⁷¹ Such UK legislation as does purport to implement the directive expressly excludes the Lloyd's enterprise: see Reorganisation Regulations, §3.

⁷² On implementation of the directive in relation to the Lloyd's enterprise, see for example *Implementation of the insurers reorganisation and winding-up directive — Consultation Document* (Treasury, November 2002), §11-15:-

11. It is clear that the Directive is intended to apply to reorganisation measures affecting or a winding up of insurance business at Lloyd's, since the "association of underwriters known as Lloyd's" falls within the definition of insurance undertaking for the purposes of this Directive, as an undertaking which has received official authorisation in accordance with the First Non-Life Directive. We will therefore need to make provision in relation to Lloyd's that will have equivalent effect to that for other forms of insurer. In some cases, it will be possible simply to extend the provisions in the attached draft regulations to cases where relevant reorganisation measures are imposed, or winding up proceedings are opened, in relation to insurance business carried on at Lloyd's. Where that is not feasible, because of the unique nature of the organisation of insurance business at Lloyd's, we intend to implement the Directive in a way which will achieve its required purposes. 12. Lloyd's is a complex organisation and inevitably, in order to achieve the outcomes intended by some parts of the directive, some additional legislative provision will be needed. It has not been possible to complete that work in time for this consultation paper. The main area where we need to do further work is in respect of the transposition of Article 10 which requires member States to give priority to claims from direct insurance creditors ahead of ordinary creditors. 13. While we consider that some changes may need to be made to the way in which the statutory insolvency regime currently applies in relation to persons carrying on insurance business at Lloyd's to ensure the proper implementation of the directive, there are some fundamental aspects of the Lloyd's structure that we do not believe it is appropriate for us to interfere with. In particular, it is fundamental that members of Lloyd's underwrite for their own account and they do not therefore have responsibility for the liabilities of other members. The only way in which such liabilities are "mutualised" is in that members have an obligation to pay certain levies to the Central Fund. That obligation is not unlimited. Our starting presumption is that the several liability of the members would need to be respected. 14. In developing the necessary legal framework, we will give consideration to whether there are ways in which a winding up process could be made to run more smoothly, without fundamentally affecting the rights of policyholders or materially increasing the costs to the members – both in terms of their underwriting liabilities and the professional fees. 15. Further work is required on how to implement the Directive in relation to Lloyds and we will consult further on this in due course.

⁷³ The Treasury's apparent struggle on certain fundamentals of the Lloyd's enterprise, taken together with the FSA's apparent lack of literary fluency, understanding and frankness, plus deeply ingrained *Penrose*-

current impediments

- P16** Publication of the Treasury's relevant consultation paper ('CP') was apparently imminent in January 2004. The Treasury appears now to keep postponing it for some reason. In January 2004, a UK government lawyer apparently close to the CP draft asseverated, presumably after his own research or on advice, to the Author that "Society of Lloyd's"⁷⁴ was a statutory or otherwise accurate technical term. The Author ventured to express his opinion that there was no such body. We like to imagine that the Treasury then reconsidered relevant parts of the CP, recognising the impossibility of accurate, credible implementation without a clear realisation (preferably but apparently not⁷⁵ presently shared by the FSA) that Lloyd's is not properly called "the Society of Lloyd's", that the Corporation is not a society, that no syndicate sells insurance, that conventional RTC is not and cannot in an enterprise meltdown practicably or fairly be transmuted into reinsurance, that deployment of the Central Fund to pay insurance liabilities is probably — as a FO legal matter, whatever the BO byelaws may say — not a matter of self-regulatory discretion or FSA-regulatory wishfulness but of BO self-regulatory, external insurance regulatory and or BO and or FO 'enterprise' obligation, and that many other common notions of the elementary financial dynamics of the Lloyd's enterprise are mere regurgitated mythology and misunderstanding. It is conceivable that the Treasury will eventually produce (embarrassingly to the FSA) a rare example of a regulatory document employing key "Lloyd's" terms and concepts other than egregiously inaccurately. But *Unlimited-Liability Insurers CP* intriguingly hints⁷⁶ that the Treasury itself still misunderstands, or still finds difficulty accurately articulating, elementary financial dynamics of the Lloyd's enterprise.

matters to address

- P17** The eventual, post-CP implementation measure will presumably address or inspire the addressing (but how felicitously?) of numerous elementary matters such as (for example) the detailed procedure for winding up the entire Lloyd's enterprise (including the respective functions and powers of the enterprise and its insolvency guardian), including that to be adopted by its insolvency guardian for identifying, quantifying, liberating, marshalling, holding and distributing appropriate PU and CU, dedicated and not-dedicated, expressly and arguably available, MO and BO claims payment securitisation trust and other funds, to pay precisely which FO and BO creditors of which SYA participants; the procedure for assureds-at-Lloyd's to document, lodge, value and prove their claims; how to deal efficiently and expeditiously with relevant substantive and procedural coverage issues; FO, MO and BO accounting issues at SYA-participant, SYA-stamp, SYA, syndicate and slip levels — the legislation will have to particularly address the performance and discharge of FO and BO 'debt instruments' addressing the same insurance liabilities; netting off and set-off; ranking of claims between rationally conceived and properly constituted classes; the FO contractual and or other liability in the first place directly or indirectly to the assured-at-Lloyd's of (for example) an insolvent Lloyd's enter-

identified social and cultural obstacles to clear regulatory thinking and decisive regulatory action, bode ill for the immediate, robust, competent, properly informed, transparent, intelligible and effective regulatory intervention required were not-BBSN circumstances to supervene.

⁷⁴ See ¶2.16 etc.

⁷⁵ See ¶2.16 etc.

⁷⁶ See Chapter 4, fn. 576.

prise,⁷⁷ Members, the SYA participant *solus*, relevant generations of conventional inward-RTCing SYA participant, the Corporation, the Central Fund and other relevant components of the Lloyd's enterprise; costs of the insolvency process; avoidance of relevant pre-liquidation transactions (and it will be interesting to compare the result with, for example, the NAIC's Rehabilitation and Liquidation Model Act).

- P18** It should not be forgotten that the Lloyd's enterprise has only relatively recently scrambled out of actual insolvency by what appears to be an audacious sleight of hand — the 'Equitas' construct — which succeeds in protecting assets at Lloyd's not by extricating EquitasRe-reinsured SYA participants as conduits to appropriate claims payment securitisation funds but principally because it is fundamentally misunderstood by US assured-side lawyers (see next paragraph). That Equitas Re's Proportionate Cover Plan, or eventual personal insolvency, is to have the slightest legally binding effect on any EquitasRe-assured-at-Lloyd's is wholly untenable legally, but it finds few informed gainsayers at the US policyholder bar. Self-regulators-at-Lloyd's and external insurance regulators may not find it so easy to repeat the 'Equitas' stunt when insolvency strikes the enterprise again.

SPECIALIST-PRACTITIONER ERROR CONCERNING EQUITAS RE

assured-side error

- P19** Material misunderstanding of relevant English law and practice concerning the Lloyd's and Equitas enterprises — now amply evidenced in pleadings, secondary literature, and premature, unnecessarily cheap settlements at Equitas Re made under a mistake of fact (*viz.*, loss of recourse to the Lloyd's enterprise) — is widespread among self-averredly expert US assured-side lawyers. The Lloyd's enterprise and Equitas Re are to be complimented on their shrewd prospective estimation of such lawyers (or congratulated on their luck). The selling of fundamentally erroneous⁷⁸ legal and factual advice on Equitas Re, and the accomplishing of such settlements (of considerable protective value to Equitas Re's own personal funds and to relevant claims payment securitisation trust and other funds at Lloyd's) may come to rank as two of the US assured-side insurance bar's most outstanding professional scams. It would be curious indeed were there not to be a number of legal malpractice suits when the valid-claimant settler EquitasRe-assured-at-Lloyd's client comes to fully appreciate how much his own lawyers have really cost him.

⁷⁷ Perhaps also in relation to its pre- and post-sale blandishments (some of which gave Bailhache J unease in *Industrial Guarantee Corporation v Lloyd's* [1924] 19 Ll.L.Rep. 78).

⁷⁸ US claimant-side lawyers err persistently and incorrigibly on (for example): (1) the relevance to the EquitasRe-assured-at-Lloyd's of an EquitasRe-reinsured SYA participant's solvent or insolvent outward reinsurer (such as, for example, Equitas Re) and or Equitas Policyholders Trustee, and or of the EquitasRe-reinsured *solus*; (2) the Lloyd's enterprise's abrogation without due process of the Golden Rule in relation to EquitasRe-reinsured liabilities. Some claimant-side US lawyers have even persuaded their clients to sue Equitas Re as an assumption reinsurer — in some cases on the *non sequitur* that Equitas Re, like any managing agency ordinarily at Lloyd's, is a comprehensively empowered run-off agent — to the exclusion of relevant EquitasRe-reinsured SYA participants, thereby endangering the claimant's recourse to the very claims payment securitisation funds to which such participants are designedly a conduit. In BBSN circumstances, given that MO funds are available to pay 'Matured Claims', it can by definition rarely if ever be appropriate for an assured-at-Lloyd's to sue a SYA participant's outward reinsurer to the exclusion of a conduit SYA participant. Such errors, and others, are now amply evidenced on the public record in open court filings and in some secondary literature in professional journals.

carrier-side error

- P20** It is a not unreasonable expectation that carrier-side authors — presumably better informed than their opponents — elucidate the Lloyd's enterprise and the 'Equitas' construct when publishing, in law journals of record, supposedly learned papers on the subject. A recent bizarre example of the exact opposite has occasioned the Author's summary, non-exhaustive rebuttal, *'Equitas Under English Law': An English Lawyer Replies*, reproduced at Appendix I.

RJA

Lincoln's Inn

May 29, 2004

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SOLVENCY AT LLOYD'S

orientation

1.1 Starting points in considering regulatory solvency of the Lloyd's enterprise include (for example):-

(1) recognition that the enterprise is not viable without a sufficient Central Fund,¹ which is not feasible (notwithstanding apparent theoretical insurance cover) without sufficient contributions from Members;²

(2) EquitasRe-reinsured SYA participants' continuing liability — as both *solus* and conduit to relevant claims payment securitisation funds — for EquitasRe-reinsured liabilities (soon to be classified for external insurance solvency regulatory purposes as its contingent³ liabilities);

(3) the necessity for the most rigorous conceptual, terminological and transactional distinction⁴ (which, for different reasons, neither the EU⁵ nor the FSA⁶ observes)

¹ See Chapter 4.

² See ¶4.90 *et seq.*

³ See the FSA's proposal at CP 04/7, §2.100:-

We propose to clarify our rules to distinguish the current concessionary treatment (which we propose should continue) from the previous (pre-1996) treatment. So the proposed rules do not require the original business to be accounted for within Lloyd's but instead there is a contingent liability and the value of that liability (if any) would need to be accounted for in line with GAAP under PRU 1.3.

⁴ On the distinctions between Member and SYA participant, Membership and SYA participation, and Member-level liabilities and SYA-level liabilities, see Chapter 2. LLD, §§12.2.4R and 12.2.5G ("credit insurance business well illustrate the distinction and the FSA's infelicitous approach to articulating it *Per* FSA Glossary, "credit insurance business": '(in "LLD") "insurance business" relating to "credit" contracts.' *Per ibid.*, "credit":-

(1) (except in relation to a "class" of "contract of insurance") any kind of loan, deferment of repayment of any loan or of interest on any loan, guarantee or indemnity, and any other kind of accommodation or facility in the nature of credit. (2) (in relation to a "class" of "contract of insurance") the "class" of "contract of insurance", specified in paragraph 14 of Part I of Schedule 1 to the "Regulated Activities Order" (Contracts of general insurance), against risks of loss to the "persons" insured arising from the insolvency of debtors of theirs or from the failure (otherwise than through insolvency) of debtors of theirs to pay their debts when due.

Per "class":-

between the SYA participant⁷ (who is party to, and personally Lloyd's Act 1982, s.8(1)-liable under, insurance contracts) and the Member⁸ (who is neither). SYA-level and Member-level liabilities are materially different to each other. The distinction is of the utmost importance in analysing, attributing and discharging insurance liabilities at Lloyd's in not-BBSN circumstances;

(4) the tendency of an insurance undertaking such as the Lloyd's enterprise to become a FO-BO multi-level, multi-lateral compound pyramid, Ponzi-⁹ type scheme, including (for example) by using premium (*cf.* reserves) and fresh unsuspecting FAL to pay claims, and by dissipating improperly calculated reserves¹⁰ (*cf.* genuine net surplus¹¹) to conjure 'profit' to SYA participants and 'profit commission' to members' and managing agencies, thus recruiting assureds-at-Lloyd's in the FO and SYA participants in the BO;¹²

(5) the enterprise's probity and financial solidity cannot be vouchsafed by its own blandishments,¹³ mere passing of external insurance regulatory solvency tests,¹⁴ the

(in "AUTH", "IPRU(FSOC)", "IPRU(INS)", "LLD" and "SUP") (in relation to a "contract of insurance") any class of "contract of insurance" listed in Schedule 1 to the "Regulated Activities Order" (Contracts of insurance).

⁵ Which does not descend to the level of Member or SYA participant in the first place: see First Non-Life Directive, §8(1)(a); First Life Directive, §8(1)(a) ("association of underwriters known as Lloyd's").

⁶ See the FSA's comprehensive terminological and conceptual confusion at (for example) CP 16 solvency, §4 (original italics): 'While the Directive generally refers to *insurers*, a reference made to Lloyd's is a reference to the Society as a whole (ie, "the association of underwriters known as Lloyd's" [quote footnote reads: 'See Article 8 of the First Non Life Directive (73/239/EEC)']). Thus while the Member is legally the insurer, the solvency tests prescribed by the Directive apply to Lloyd's in the aggregate rather than to Members individually.' Note: (1) the failure to distinguish between Members and SYA participants; (2) conceptual and terminologically erroneous use of 'Society' (also inconsistent with FSA Glossary's definition of "Society"); (3) incoherent use of "Lloyd's in the aggregate". On the FSA's failure to make the relevant distinction(s), see (for example) LLD, §11.1.4G ('Members are not responsible for meeting the liabilities of other members ...'), which clearly refers to SYA-level, Lloyd's Act 1982, s.8(1)-type several liability, not to the Member-level liability to contribute to a central fund, on which see *ibid.*, §3.2.1G, §11.2.1R, etc. The FSA does not appear to have understood the principal issue in *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA). Elsewhere, however, the FSA does seem to be somewhat aware of the distinction between Membership and SYA participation: see for example FSMA 2000, s.316(1) (mere Members do not sell insurance); Regulated Activities Order, §3(1), definition of 'managing agent' ('... to perform for a member of Lloyd's ...') read with *ibid.*, §86(2) ('[a] person's membership ... of a Lloyd's syndicate'). Absent a contrary indication in a Consultation Paper or Policy Statement, the FSA's failure to properly distinguish between Membership and SYA participation, and between Member-level and SYA-level liabilities, appears to be a simple failure of analysis, comprehension and or draftsmanship.

⁷ See ¶2.72 *et seq.*

⁸ See ¶2.50 *et seq.*

⁹ See ¶2.104.

¹⁰ An insurance enterprise self-endowed with mechanisms through which it is self-regulatorily permitted, and for numerous reasons commercially encouraged, to dissipate reserves as false 'profit' — at Lloyd's, that mechanism is conventional RTC — requires particular vigilance by external insurance regulators with relevant inside information. See recently (in the life insurance context) *Penrose*, 551:-

Pickford noted that both he and Sherlock had acknowledged the risk in a strategy of declaring a bonus for the current year in the expectation of improvements in the following year, and he concluded by stating that, if the market fell considerably in the future, urgent talks would be needed with the Society's actuary (as they would be with other companies in a similar position).

Leaching reserves as false profit was a staple of the Lloyd's enterprise until R&R.

¹¹ An insurance enterprise that has not yet discharged all its valued insurance liabilities cannot be said to have made a genuine, distributable 'profit'.

¹² It is a singularity of the Lloyd's enterprise that its apparent SYA-level and Member-level, FO and BO, PU and CU pyramid features, especially between 1979 and 1991, have not been exhaustively canvassed in litigation or criminal proceedings. On actionable recruitment to Lloyd's, see ¶2.104.

¹³ And see *Penrose*, 584.

misconceived emissions of credit rating agencies¹⁵ or the opinions of journalists¹⁶ — especially an insurance enterprise 'too venerable to be of real concern';¹⁷ too peculiar to be conventionally regulated;¹⁸ where publicised regulatory or judicial criticism would overnight¹⁹ undermine mis-placed confidence;²⁰ whose regulatory returns fail 'fully to reflect the way in which the business [is] actually run';²¹ and where intellectually ill-equipped external insurance regulators have a 'narrow concentration on regulatory solvency ... preclud[ing] an overall assessment';²²

(6) three (nurtured and now mature) features of the Lloyd's enterprise continuing to impede its effective external regulation, *viz.*, its importance (and regulatory officials' corresponding reticence); its apparent complexity,²³ and its mythology (now embedded in relevant external insurance regulatory instruments, such as those referring to "Society of Lloyd's");

(7) external insurance regulation of the Lloyd's enterprise's solvency may be subject to political and commercial pressures to camouflage or otherwise conceal its insolvency. Such pressures were apparent before R&R (and more recently in relation to Equitable Life²⁴). There also appears²⁵ to be resistance in judicial circles to impairing the enterprise's apparent fragrance.

¹⁴ See *Penrose*, Ch. 7.

¹⁵ See *Penrose*, 584, disclosing that external insurance regulators were influenced by the opinions of credit rating agencies supposedly based on the evaluation of external insurance regulators.

¹⁶ See for example *Investors Chronicle*, October 25, 1985, p.102:-

Now is the time for all good men and true who can pass the solvency tests (which are not as demanding as some might think) to become members of Lloyd's. New names can — we hope — assume that the risk of anything going wrong, over and above the purely insurance type risk which they are paid to run, is now virtually nil.

¹⁷ See *Penrose*, 551 (italics added; suitability relates principally to the intellectual and moral calibre of assigned officials, not to mere words in a regulatory document):-

The Society [Equitable Life], it appears, was too venerable to be of real concern, and lack of information provided grounds for inaction. The risk of undermining market confidence in the Society appeared to influence regulators at later stages as well as at this time. Regulators had been given an insight into the Society's practice that might reasonably have alerted them to a need for monitoring of current and future practice. No special steps were taken to put in place a *suitable* system.

¹⁸ See *Penrose* 562:-

This perception of the Society's uniqueness was echoed in a number of the regulators' statements taken by the inquiry. It is unfortunate that appreciation that the Society was unique did not provoke a keener interest in the implications for policyholders.

And see *ibid.*, 568:-

Pickford had recognised at the meeting on 19 May that the Society's approach did not fit very well into the current regulatory regime. The labelling of the Society as unique appears frequently within the regulatory papers, but what is absent is any analysis of the extent to which this might prove a barrier to effective regulation and, if so, what changes to the current regulatory system might be needed.

¹⁹ And see *Cromer WP*, p.8: 'Some underwriters said to us that, if capacity was seen to be inadequate, a point might come, quite quickly and suddenly, when there would be a massive loss of business. We consider that there is some substance in this fear.'

²⁰ See *Penrose*, 551.

²¹ *Penrose* 552.

²² *Penrose*, 558.

²³ On an equivalent problem at Equitable Life, see for example *Penrose*, 589-9: 'The scrutiny process for the 1991 returns indicates that, without explicit guidance from GAD, the regulators did not have the depth of knowledge about the Society that would have enabled them to make a more accurate assessment of the Society's financial strength.'

²⁴ See for example *Penrose*

²⁵ Judicially perceived 'fragrance', a common law equivalent of venerability, appears to have been a factor in some suits brought against the Corporation: see for example *R v Lloyd's ex parte Briggs* {1a} [1992]

who are and are not FSA-authorised
apparently no insurer principal authorised

- 1.2 Singularly (as discussed below), the FSA — notwithstanding the FSA Glossary's infelicitous characterisation of the Corporation as an "insurer" — presently appears to not authorise any principal, including the Corporation,²⁶ to effect or carry on insurance business at Lloyd's.

the Corporation

- 1.3 The Corporation's place in FSA regulation of the Lloyd's enterprise may be summarised as follows:-

(1) the Corporation is²⁷ a FSMA 2000, s.19(1)(a) 'authorised person'²⁸ with *ibid.*, Part IV permission²⁹ to 'carry on'³⁰ (implicitly only so far as consistent with its Lloyd's Act 1911, s.4 objects³¹) apparently³² *only* the following 'regulated activities': (a) arranging deals in contracts of insurance written at Lloyd's;³³ (otherwise prohibited³⁴); (b) arranging deals in participation in Lloyd's syndicates;³⁵ (c) 'an

COD 456 (QB Div. Ct.); *ibid.*, {2a} [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.); *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J) and *ibid.*, {2b} [2002] EWCA Civ. 1101 (CA; arguably the weight of evidence of apparent fraudulent misrepresentation and apparent fraudulent non-disclosure would have been enough to inculcate a less politically or commercially significant defendant). And see incidentally *Moran v Lloyd's* [1981] 1 Lloyd's Rep. 423, 424 (Lord Denning MR: 'Everyone has heard of Lloyd's. It is the greatest insurance market in the world'). Cf. Bailhache J in *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, who does not seem to have had any hesitation in condemning the Lloyd's enterprise but seems to have been relieved at not having had to do so.

²⁶ The layman would presumably obtain the impression from the FSA register that there was an entity or body called "Society of Lloyd's" regulated to personally execute insurance contracts; the register entry, though it lists no particular FSMA 2000, Part IV permissions, is misleading to that extent. *Per ibid.*, at March 15, 2004, 'registered name' is "Society of Lloyd's" ('effective' November 26, 2001); 'common name' is Lloyd's of London ('effective' March 19, 2003) (the meaning and significance of 'effective' is not evident or stated). The "Society" is 'authorised' (in relation to what FSMA 2000, s.22(1) and (5) 'regulated activities' 'specified' in Regulated Activities Order is not specified) from 'effective date' December 1, 2001; FSA registration number 202761; formerly regulated by the Treasury from January 1, 1901 to November 30, 2001: *ibid.* 'Basic details': 'Lloyds [*sic*] Building, 1 Lime Street London EC3M 7HA; Phone: 020 73271000 Fax: 020 72375599; Website: www.lloyds.com.' When the Author mentioned to an apparently responsible FSA official that the website register entry did not specify the activities in relation to which the "Society" had permission, the official expressed surprise.

²⁷ FSMA 2000, s.315(1).

²⁸ See generally FSMA 2000, ss.19(1)(a), 31, etc.

²⁹ FSMA, s.315(3) ('For the purposes of Part IV, the Society's permission is to be treated as if it had been given on an application for permission under that Part.'). and see *ibid.*, s.31 etc.

³⁰ Cf. (for example) Regulated Activities Order, §10(2) ('carrying out').

³¹ See ¶2.18.

³² See ¶P.13(3) on the unhelpfulness of the Corporation's FSA register entry concerning its FSMA 2000, Part IV permissions.

³³ FSMA 2000, s.315(2)(a) (the so-called 'basic market activity': *ibid.*); and see *ibid.*, s.22(1) and (5) read with Regulated Activities Order, §4 and *ibid.*, §58 ("The arranging, by the society incorporated by Lloyd's Act 1871 by the name of Lloyd's, of deals in contracts of insurance written at Lloyd's"). See generally for example Financial Secretary to the Treasury, Standing Committee A, December 7, 1999, c.1168:-

Primarily, the permission will cover making arrangements which enable members to carry out contracts of insurance. The permission does not include carrying out contracts of insurance, which is done by the Society's members, not the Society itself.

'[D]eals' is highly infelicitous. Insurance contracts made at Lloyd's are arguably traded at Lloyd's at the conventional RTC stage, but not directly otherwise.

³⁴ FSMA 2000, s.19(1) read with *ibid.*, s.22(1) and (5) read with Regulated Activities Order, §58.

³⁵ FSMA 2000, s.315(2)(b) (the so-called 'secondary market activity': *ibid.*). Unlike in relation to FSMA 2000, §.315(2)(a), Regulated Activities Order does not appear to have a counterpart of FSMA 2000, s.315(2)(b); cf. Regulated Activities Order, §56 (presumably not a task with which the Corporation would

[sic] activity carried on in connection with, or for the purposes of', the foregoing.³⁶ The extent which the Corporation 'arranges' bears closer examination in light of *Lloyd's v Jaffray* {2}.³⁷ In seeking to discharge its regulatory functions in relation to the enterprise, the FSA, whose comprehension thereof is questionable,³⁸ insistently avers³⁹ protection of the assured-at-Lloyd's. Notwithstanding, the FSMA 2000, s.150(1) right of a "private person"⁴⁰ to sue an "authorised person"⁴¹ — in the

with to be associated). Cf. SYA participation as a form (allegedly, and debatably) of investment: see for example Regulated Activities Order, §86; Financial Services and Markets Act 2000 (Carrying On Regulated Activities by way of Business) Order 20001 (SI 2001/1177), §3(c).

36 FSMA 2000, s.315(2)(c).

37 {2a} [2000] CLC 725 (Cresswell J); {2b} [2002] EWCA Civ. 1101 (CA).

38 See ¶P10-P11.

39 See (for example) relevant FSA consultative emissions and LLD, §1.1.2G:-

The guidance in this chapter is intended to: (1) promote confidence in the market at Lloyd's by ensuring that it is appropriately and effectively regulated by the Society and the Council and those to whom the Council delegates the Society's regulatory functions; (2) protect policyholders and members[.]

And see *ibid.*, §3.1.3G:-

The "rules" and "guidance" in this chapter are intended to promote confidence in the market at Lloyd's, and to protect certain "consumers" of services provided by the "Society" in carrying on, or in connection with or for the purposes of, its "regulated activities".

And see *ibid.*, §5.1.3G:-

The "rules" and "guidance" in this chapter are intended to promote confidence in the market at Lloyd's and to protect certain "consumers" of services provided by the "Society" in carrying on or in connection with or for the purposes of its "regulated activities" by: (1) protecting policyholders against the risk that "former underwriting members" may not be able to meet any liabilities to carry out "contracts of insurance" that they underwrote at Lloyd's; and (2) enabling the "FSA" to impose requirements under section 320(3) of the "Act" (Former underwriting members) if it considers this appropriate to protect policyholders.

And see *ibid.*, §6.1.2G:-

The "insurance market direction" given in this chapter is intended to protect the interests of policyholders and potential policyholders by: (1) making "members" subject to the "Compulsory Jurisdiction" of the "Financial Ombudsman Service" with respect to the carrying on of insurance business; and (2) enabling the complaints of policyholders who are "eligible complainants" to be dealt with under the rules of the "Financial Ombudsman Service".

And see *ibid.*, §9.1.4G:-

The purpose of this chapter and LLD 10 to LLD 15 is to: (1) protect policyholders against the risk that the "Society" and "members" may not have adequate financial resources to meet "claims" as they fall due; (2) promote confidence in the market at Lloyd's by requiring the "Society", and through it "members", to maintain resources which are adequate to meet their liabilities; (3) promote confidence in the market at Lloyd's and enhance public awareness by improving the transparency of financial reporting by the "Society"; and (4) protect the interests of "consumers" of "insurance business" at Lloyd's.

And see similarly for example *ibid.*, §9.3.10 ('suitable trust arrangements to provide policyholders with additional safeguards').

40 See generally FSMA 2000, s.150(5). *Per* Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256), §3, 'private person':-

(1) ... (a) any individual, unless he suffers the loss in question in the course of carrying on — (i) any "regulated activity"; or (ii) any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and (b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind; but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation. (2) For the purposes of paragraph (10(a), an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of article 10 of the Regulated Activities Order) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity.

Per FSA Glossary, "private person":-

(a) any individual, unless he suffers the loss in question in the course of carrying on: (i) any "regulated activity"; or (ii) any activity which would be a "regulated activity" apart from any exclusion made by article 72 of the Regulated Activities Order (Overseas persons); and (b) any "person" who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind; but not including a government, a local authority (in the "United Kingdom" or elsewhere) or an international organisation; for the purposes of (a), an individual who suffers loss in the course of "effecting" or "carrying out contracts of insurance" written at Lloyd's is not to be taken to suffer loss in the course of carrying on a "regulated activity"; in this definition: (A) "government" means: (I) the government of the "United Kingdom"; or (II) the Scottish Administration; or (III) the Executive Committee of the Northern Ireland Assembly; or (IV)

present context, the Corporation — for a contravention of (among others) LLD, Ch. 9 has been disapplied;⁴²

(2) it does not, is not statutorily⁴³ authorised to, does not appear to be deemed⁴⁴ by the FSA to, and does not appear⁴⁵ to be permitted by the FSA to, conduct any Regulated Activities Order, §10 'regulated activity' as a principal. and apparently is not, nor need it be or should be, an 'authorised person' in relation to any of those activities.

(3) curiously, FSA Glossary (perhaps in a drafting error) categorises the Corporation as an "insurer". *Per ibid.*, "insurer" means (so far as relevant) a "firm" with "permission" to "effect" or "carry out" "contracts of insurance" (the Corporation appears to have no such permission); a "firm" includes an "authorised person"; and "authorised person" includes⁴⁶ the Corporation, which is thus in the curious position of being personally⁴⁷ regulated as if it were an "authorised person" in relation to Regulated Activities Order, §10, *viz.*, it is under the "insurer"-specific obligation to (for example) conduct its insurance business (which it does not conduct in the first place) with integrity and maintain 'adequate' financial resources,⁴⁸ and not mislead assureds-at-Lloyd's.⁴⁹ Somewhat inconsistently, the Corporation appears not to be an 'insurer' for purposes of FSMA 2000, Part XXIV ('Insolvency').⁵⁰

1.4 The FSA's choice of the Corporation (*cf.* the EU Commission's choice of something indeterminate⁵¹), if not conceptual and or terminological error for some other com-

the National Assembly for Wales; or (V) the government of any country or territory outside the "United Kingdom"; (B) "international organisation" means any international organisation the members of which include the "United Kingdom" or any other State; (C) "local authority", in relation to the "United Kingdom", means: (I) in England and Wales, a local authority as defined in the Local Government Act 1972, the Greater London Authority, the Common Council of the City of London or the Council of the Isles of Scilly; (II) in Scotland, a local authority as defined in the Local Government (Scotland) Act 1973; and (III) in Northern Ireland, a district council as defined in the Local Government Act (Northern Ireland) 1972.

The phrase "written at Lloyd's" is italicised in FSA Glossary inconsistently: see (for example) defined term "arranging deals in contracts of insurance written at Lloyd's"; definitions of "private person", "regulated activity", §(s), "Society's basic market activity" (italicised); *cf. ibid.*, definitions of "arranging deals in contracts of insurance written at Lloyd's", "Lloyd's policy", "syndicate".

⁴¹ See generally FSMA 2000, s.31(2).

⁴² LLD, §9.1.3R read with FSMA 2000, s.150(2).

⁴³ See FSMA 2000, s.315(2)(a)-(c).

⁴⁴ For example, the FSA, for FSMA 2000, s.19(1)(a) authorisation or *ibid.*, s.19(1)(b) exemption purposes, does not appear to treat the Corporation as a proxy for SYA participants.

⁴⁵ The FSA Register provides no assistance on the extent of the Corporation's FSMA 2000, Part IV permission: see ¶P.13(3).

⁴⁶ FSA Glossary, definition of "authorised person", §(f).

⁴⁷ See generally (for example) LLD, Chapters 9 ('Prudential requirements for the Society'; and see *ibid.*, §9.1.1R ('This chapter applies to the "Society"')), 10 ('Insurance operational risk'; and see *ibid.*, §10.1.1R ('This chapter applies to the "Society"')), 11 ('Required margins of solvency'; and see *ibid.*, §11.1.1R ('This chapter applies to the "Society"')), 12 ('Determination of liabilities'; and see *ibid.*, §12.1.1R ('This chapter applies to the "Society"')), 13 ('Assets: valuation and realisability risk'; and see *ibid.*, §13.1.1R ('This chapter applies to the "Society"')), 14 ('Assets: market and credit risk'; and see *ibid.*, §14.1.1R ('This chapter applies to the "Society"')), and 15 ('Reporting by the Society'; and see *ibid.*, §15.1.1R ('This chapter applies to the "Society"')). On mis-use of the word 'society', see ¶2.16.

⁴⁸ See respectively PRIN, §2.1.1R, Principles 1 ('Integrity') and 4 ('Financial prudence'). On the applicability of each to the Corporation, see (for example) FSA Glossary, definition of "firm" and then definition of "authorised person", §(f).

⁴⁹ PRIN, §2.1R, Principle 7 ('Communications with clients').

⁵⁰ See ¶2.7.

⁵¹ See ¶2.15.

ponent(s) of the Lloyd's enterprise, suggests that the FSA intends that all insurance liabilities ultimately be discharged by the Corporation personally (*cf.*, for example, Members collectively, or Members and the Corporation jointly or jointly-and-severally or on some other basis), a notion which appears to be inconsistent with the Council's statutory,⁵² regulatory,⁵³ and self-given⁵⁴ discretions⁵⁵ as to how the Corporation's personal assets are to be used, and which in any event does not work financially given the Corporation's limited income (which does not include premium; the 'callable layer' is another matter), without a corresponding obligation, conspicuously absent from statute,⁵⁶ FSA regulation,⁵⁷ and byelaw,⁵⁸ on Members to make sufficient contributions to the Corporation's personal assets in the first place.

the SYA participant

- 1.5 *Per* FSMA 2000, s.19's 'general prohibition',⁵⁹ no principal may (so far as presently relevant) 'effect' or 'carry out' a 'contract of insurance'⁶⁰ unless he is an 'authorised person' or an 'exempt person'.⁶¹ Though conducting Regulated Activities Order, §10 'regulated activities' (which include reinsurance⁶²) as a principal (always⁶³ through a managing agency), no SYA participant (*cf.* Member) is bound by the 'general prohibition' in any event;⁶⁴ is not⁶⁵ a FSMA 2000, s.19(1)(a) 'authorised person'; and is⁶⁶ a FSMA 2000, s.19(1)(b) 'exempt person', self-regulators-at-Lloyd's self-

⁵² See Lloyd's Act 1911, s.7(c).

⁵³ See LLD, §3.2.1G.

⁵⁴ See for example OCFB, §8 (Monies out of the funds or property of the Society other than the Central Fund).

⁵⁵ See ¶2.23.

⁵⁶ There is no statutory obligation, in Lloyd's Acts 1871-1982 or elsewhere, on any Member to contribute any money for any purpose to the Corporation or the Central Fund.

⁵⁷ On LLD, §3.2.1G, see ¶4.64.

⁵⁸ To the extent that the Central Fund is (as the Council seems to consider, arguably erroneously) part of the Corporation's personal assets, a contribution obligation is in OCFB and NCFB, but sufficiency is not thereby self-regulatorily vouchsafed.

⁵⁹ FSMA 2000, s.19 and *ibid.*, s.19(2).

⁶⁰ Defined at Regulated Activities Order, §3(1), and see *ibid.*, Sch. 1; *cf.* FSA Glossary definition of "contract of insurance". And see Regulated Activities Order, §3(1) definitions of 'contract of general insurance', and see *ibid.*, Sch. 1, Part I (*cf.* FSA Glossary definition of "general insurance contract"), 'contract of long-term insurance', and see *ibid.*, Sch. 1, Part II (*cf.* FSA Glossary definition of "long-term insurance contract"), and 'qualifying contract of insurance'.

⁶¹ FSMA 2000, s.19(1)(a) ('authorised person') and *ibid.*, s.19(1)(b) ('exempt person') read with *ibid.*, ss.22(1) and 22(5); *ibid.*, Sch. 2, §20; and Regulated Activities Order, §10(1) (effecting) and *ibid.*, §10(2) (carrying out).

⁶² Regulated Activities Order, §10 read with *ibid.*, Sch. 1 ('Contracts of insurance'), Part I ('Contracts of general insurance'), §13 ('General liability'), §16 ('Miscellaneous financial loss'), sub-§(c). *Cf.* insurance regulation that does not apply to reinsurance, such as (for example) Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 (SI 2001/2635), §3(1).

⁶³ See generally Lloyd's Act 1987, s.8(2) and Byelaw 8 of 1988, etc.

⁶⁴ FSMA 2000, s.316(1); the FSA has not yet so directed.

⁶⁵ See the drafting infelicity at FSMA 2000, Sch. 6, §1(1) ('the authorised person must be ... a member of Lloyd's').

⁶⁶ See Regulated Activities Order, §13 ('Application of sections 327 ['Exemption from the general prohibition'] and 332 ['Rules in relation to persons to whom the general prohibition does not apply'] of the Act to insurance market activities'), which appears to be inappropriate given FSMA 2000, s.316(1) and the present absence of a relevant 'direction'. Presumably an *ibid.*, s.316(2) direction would require amendment of the Order *cit.*, §13.

regulating (subject to FSMA 2000, Part XIX and other relevant law) Members and SYA participants while the FSA attempts to externally regulate the Corporation. The personal and or self-regulatory insolvency of a Member or SYA participant, though it has BO consequences, has, in BBSN circumstances, few if any FO or MO consequences. For example, the valid-claimant assured-at-Lloyd's still has a serviceable insurance contract with the SYA participant (if it still exists⁶⁷), can still use the insolvent SYA participant as a conduit to relevant claims payment securitisation funds (which are there, and regulatorily required to be there, precisely for that purpose), and that insolvency makes no difference to the existence, availability or accessibility of those funds⁶⁸ to pay his claim. In not-BBSN circumstances, a SYA participant's relevance as conduit and *solus* may be altogether different.

former underwriting Members

- 1.6** Membership, though not irrelevant to his various relevant BO funding liabilities, does not affect a SYA participant's participation — or FO liability, as either *solus* or conduit — on an insurance contract to which he happens (originally or by novation) to be a party. FSA regulation recognises that that liability is independent of Membership.⁶⁹ The FSA is empowered to impose on a former underwriting Member⁷⁰ (who needs no FSMA authorisation to 'carry out' his insurance contracts⁷¹) 'such requirements as appear to it to be appropriate for the purpose of protecting policyholders against the risk that he may not be able to meet his liabilities'.⁷² The FSA is empowered to make (previously published in draft⁷³) rules imposing such requirements on persons to whom the rules apply as appear to it to be appropriate for protecting policyholders against the risk that those persons may not be able to meet their liabilities.⁷⁴ The rules may apply to former underwriting Members generally;⁷⁵ or to a specified class of former underwriting Member.⁷⁶ The precise requirements imposed on EquitasRe-reinsured SYA participants who happen no longer to be Members are discussed elsewhere.⁷⁷

managing agency

- 1.7** No managing agency,⁷⁸ self-evidently, effects or carries on any Regulated Activities Order, §10 'regulated activity' as a principal, nor is a FSMA 2000, s.19(1)(a) 'authorised person' as proxy for any SYA participant.

⁶⁷ On corporate dissolution (which does not arise in relation to a natural SYA participant), see ¶2.121.

⁶⁸ See generally Chapter 4, Sub-Chapter 1.

⁶⁹ See for example FSMA 2000, s.321; Regulated Activities Order, §13(1)(b)(ii) ("the contract of insurance in question is one underwritten by P at Lloyd's"). The partyiness is overridden by any novatory effect of conventional RTC: see the discussion at *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁰ *Per* FSMA 2000, 324(1), 'former underwriting member' means 'a person ceasing to be an underwriting member of the Society on, or at any time after, 24 December 1996'. '[U]nderwriting member' means 'a person admitted to the Society as an underwriting member': Lloyd's Act 1982, s.2(1) read with FSMA, s.324(2).

⁷¹ FSMA 2000, s.320(1). If he happens to be an authorised person, any FSMA, Part IV permission that he has does not extend to his activities in carrying out any of those contracts: *ibid.*, s.320(2).

⁷² FSMA 2000, s.320(3).

⁷³ FSMA 2000, s.322(3) read with *ibid.*, s.319.

⁷⁴ FSMA 2000, s.322(1).

⁷⁵ FSMA 2000, s.322(2)(a).

⁷⁶ FSMA 2000, s.322(2)(b).

⁷⁷ See *Astor's Equitas Re Handbook*.

⁷⁸ Managing agencies are discussed in detail at *Astor's Law of Lloyd's*, 2nd Ed.

'insurance market directions'

- 1.8** The FSA is empowered⁷⁹ to give an 'insurance market direction' bringing a 'member of the Society'⁸⁰ and or 'members of the Society taken together'⁸¹ within the 'general prohibition'. Only if the FSA so directs in the form of a written⁸² (previously published in draft⁸³) 'insurance market direction'⁸⁴ (which may apply the general prohibition in relation to different classes of persons⁸⁵) does the 'general prohibition',⁸⁶ or a particular 'core provision' — *viz.*,⁸⁷ FSMA, Parts V, X, XI, XII, XIV, XV, XVI, XXII and XXIV, ss.384 to 386, and Part XXVI⁸⁸ — apply to the carrying on of an 'insurance market activity'⁸⁹ by an individual Member, or Members collectively.⁹⁰
- 1.9** In deciding whether to make such a direction, the FSA is required to have 'particular regard' to (among other matters⁹¹) the 'interests of policyholders and potential policyholders'⁹² and 'the need to ensure the effective exercise of the functions which the Authority has in relation to the Society as a result of section 315.'⁹³ The direction must specify each core provision, each class of person,⁹⁴ and each kind of activity to which it applies,⁹⁵ and may apply different provisions in relation to different classes of person and different kinds of activity.⁹⁶
- 1.10** In addition⁹⁷ or instead of⁹⁸ a s.316 'insurance market direction', and without prejudice to the FSA's own exercise of its powers,⁹⁹ the FSA is empowered¹⁰⁰ to give a

⁷⁹ FSMA 2000, s.316(1) *et seq.*

⁸⁰ FSMA 2000, s.316(1)(a); 'a member of the Society' is conceptual and multiple terminological error for 'SYA participant'.

⁸¹ FSMA 2000, s.316(1)(b); 'the members of the Society taken together' conceptual and multiple terminological error for 'SYA participants', begging the question of which SYAs.

⁸² FSMA 2000, s.316(5).

⁸³ FSMA 2000, s.319.

⁸⁴ FSMA, s.316(2).

⁸⁵ FSMA 2000, s.316(6).

⁸⁶ See FSMA 2000, s.19(2).

⁸⁷ FSMA 2000, s.316(3).

⁸⁸ FSMA 2000, s.317(1).

⁸⁹ *Per* FSMA 2000, s.316(3), 'insurance market activity' means 'a regulated activity relating to contracts of insurance written at Lloyd's'.

⁹⁰ FSMA, s.316(1). The direction must be published in the way appearing to the FSA best calculated to bring it to the attention of the 'public' (*ibid.*, s.316(9)). It takes effect from the date specified in it, which may not be earlier than the date on which it is made (*ibid.*, s.316(8)). The FSA is empowered to charge a reasonable fee for providing a person with a copy of the direction (*ibid.*, s.316(10)).

⁹¹ See FSMA 2000, s.316(4)(b).

⁹² FSMA 2000, s.316(4)(a).

⁹³ FSMA 2000, s.316(4)(c).

⁹⁴ And see FSMA 2000, s.317: '(2) References in an applied core provision to an authorised person are (where necessary) to be read as references to a person in the class to which the insurance market direction applies. (3) An insurance market direction may provide that a core provision is to have effect, in relation to persons to whom the provision is applied by the direction, with modifications.'

⁹⁵ FSMA 2000, s.316(7)(a).

⁹⁶ FSMA 2000, s.316(7)(b).

⁹⁷ In which event, either at the same time as, or following, if the FSA considers it necessary or expedient to do so: FSMA 2000, s.318(4)(b).

⁹⁸ FSMA 2000, s.318(4)(a) read with *ibid.*, s.316(2).

⁹⁹ FSMA 2000, s.318(6)(a).

¹⁰⁰ FSMA 2000, s.318(1).

(previously published in draft¹⁰¹) 'direction'¹⁰² to the Council (and to the Corporation,¹⁰³ and to members' and managing agencies¹⁰⁴) in relation to the exercise of 'its'¹⁰⁵ powers 'generally with a view to achieving, or in support of, a specified objective',¹⁰⁶ or in relation to the exercise of a specified power which 'it' has, whether in a specified manner or with a view to achieving, or in support of, an objective¹⁰⁷ specified in the direction.¹⁰⁸

solvency test for general insurance

regulatory context: IPRU(INS) and the three solvency tests

- 1.11** FSA¹⁰⁹ structural financial regulation¹¹⁰ of the Lloyd's enterprise particularly addresses relevant EU regulation concerning (for example) insurer solvency;¹¹¹ adequate solvency margin,¹¹² guarantee fund,¹¹³ technical provisions;¹¹⁴ matching as-

¹⁰¹ FSMA 2000, s.319.

¹⁰² Defined at FSMA 2000, 318(2). must be in writing: *ibid.*, s.318(6)(b); must be published 'in the way appearing to the Authority to be best calculated to bring it to the attention of the public': *ibid.*, s.318(7).

¹⁰³ *Viz.*, to the Corporation 'acting through the Council' (FSMA, s.318(1)), apparently misconception by the draftsman: the Council's own personal Lloyd's Act 1982, s.6(1)-(2) powers are independent of the Corporation (which has no self-regulatory organs of its own other than (to a limited extent) Members in Corporation general meeting). Nor in exercising any of those powers is the Council the Corporation's surrogate. Indeed, query if the Corporation is even a proper Council delegate: Lloyd's Acts 1871-1982 do not expressly permit the Council to delegate (by (annual delegating) resolution or otherwise) any functions or powers to the Corporation or to any Corporation employee.

¹⁰⁴ FSMA 2000, s.318(5): the statutory wording is infelicitous: query the difference between 'to' and 'in respect of'.

¹⁰⁵ FSMA 2000, s.318(2)(a); not clear whether the FSA's or the Council's.

¹⁰⁶ FSMA 2000, s.318(2)(a).

¹⁰⁷ FSMA 2000, s.318(2)(b).

¹⁰⁸ FSMA 2000, s.318(3).

¹⁰⁹ Financial supervision of the Lloyd's enterprise is the sole responsibility of the UK: First Non-Life Directive, §13.1; First Life Directive, §15.1; and see *ibid.*, §20. For precursors in relation to failed self-regulation at Lloyd's, see for example *Treasury Sel. Comm. 1*, etc. In supervising the solvency of the Lloyd's enterprise, the FSA has taken over statutory functions (see Insurance Companies Act 1982, s.84(1); Lloyd's Solvency Test Regulations, etc.) previously exercised by the DTI and more recently the Treasury, not by self-regulators-at-Lloyd's.

¹¹⁰ See FSMA 2000, Part XIX; LLD *passim*; historically (for example) relevant parts of CPs 16, 16 solvency, 48, 66, 140, 177, 178, 181 and 04/7, and PSs 16, 16 return, 48, 66, 177, 178 and 181.

¹¹¹ See generally (for example) First Non-Life Directive, §13.2 (financial supervision to include 'verification, with respect to the insurance undertaking's entire business, of its state of solvency'); similarly First Life Directive, §15.2.

¹¹² See (for example) the detailed provisions at First Non-Life Directive, §16 (the 'premium basis' and 'claims basis', etc.); First Life Directive, §18-19; Swiss Agreement Decision, Protocol 1 (similar (extant) special provisions at *ibid.*, §2.4). The solvency test provisions in both of the foregoing Directives have now been materially amended: see now First Non-Life Directive, §16 and §16a, as amended and added, respectively, by Non-Life Solvency Directive, §§1.2 and 1.3, and First Life Directive, §18 as amended by Life Solvency Directive, §1.2 (*op. cit.*, §19 as originally promulgated had special provisions concerning the Lloyd's enterprise which Life Solvency Directive's §1.2 amendment has removed). Before the recent amendments, the FSA had purportedly implemented in relation to the Lloyd's enterprise the First Non-Life and First Life Directives' relevant provisions at LLD, Ch. 11 ('Required margins of solvency', the FSA indicating that they were minimum requirements in relation to the Lloyd's enterprise: see for example CP 16, §95). The FSA has now amended LLD, Ch. 11 to implement the Non-Life Solvency Directive: see this Chapter's relevant content and historically CP 178, §1.1.12; CP 184, Chapter 5 and *ibid.*, Annex 4. Consideration of the FSA's relevant proposals in CP 04/7 (presaging further material change to LLD, Ch. 11) is outside this Edition's scope. New law will be taken into account in future Editions.

¹¹³ See in relation to conventional insurance companies generally (for example) the detailed provisions at First Non-Life Directive, §§17 and 17a as amended and added respectively by Non-Life Solvency Directive, §§1.4 and 1.5; First Life Directive, §§20 and 20a as amended and added, respectively, by Life Sol-

sets,¹¹⁵ equalisation reserve for credit insurance,¹¹⁶ and credit for outward reinsurance.¹¹⁷ The Lloyd's enterprise is not presently subject to IPRU(INS)¹¹⁸ except *ibid.*, §§9.37 and 9.38.¹¹⁹ LLD, Chapter 9 ('Prudential requirements for the Society') presently¹²⁰ 'applies substantially the same requirements to the Corporation as IPRU(INS) applies to insurers.'¹²¹ Of the three solvency tests used in relation to the Lloyd's enterprise in recent times:-

(1) a EU-mandated¹²² variant of the external insurance regulatory so-called 'combined solvency test'¹²³ — failure of which will bring about financial collapse of the Lloyd's enterprise (not considered by the EU or FSA to be a mutual society¹²⁴) and the supervision of not-BBSN circumstances, is administered by the FSA¹²⁵ (which considers the test's results regulatorily dispositive¹²⁶). FO-MO-BO¹²⁷ analysis, at

vency Directive, §§1.2 and 1.3; Swiss Agreement Decision, Protocol 1, §3. On the absence of the requirement for a minimum guarantee fund at Lloyd's, see for example CP 16 solvency, §9:-

Some additional modifications from the standard test format were required to make the end result more closely a test applied to a single entity. Therefore the test does not include a Minimum Guarantee Fund and applies the lower percentage rates specified in the Directive only, in order to avoid penalising Lloyd's by treating it for solvency purposes as a conglomerate of very small insurers.

¹¹⁴ See generally (for example) First Non-Life Directive, §§13.2, 15.1 ('The home Member State shall require every insurance undertaking to establish adequate technical provisions in respect of its entire business. The amount of such technical provisions shall be determined in accordance with the rules laid down in Directive 91/674/EEC [Insurance Accounts Directive].'); *ibid.*, §18; First Life Directive, §15.2, and see the detailed provisions at *ibid.*, §17.1 *et seq.*; Council Directive 90/618/EEC, §11, first indent; Third Life Directive, §19; *ibid.*, 21.1 (which expressly permits FAL covering relevant life business to be in the form of guarantees and letters of credit); and see the detailed provisions at *ibid.*, §22.

¹¹⁵ See generally (for example) First Non-Life Directive, §15.2; Second Non-Life Directive, Annex 1; Council Directive 90/618/EEC, §11, second indent.

¹¹⁶ See generally (for example) First Non-Life Directive, §15a; *ibid.*, Annex D.

¹¹⁷ See generally (for example) First Non-Life Directive, §15.3 ('If the home Member State allows any technical provisions to be covered by claims against reinsurers, it shall fix the percentage so allowed.'). And see LLD, §15.5 ('Major treaty reinsurers') and *ibid.*, §15.6 ('Major facultative reinsurers'), on which see incidentally Insurance Companies (Accounts and Statements) Regulations 1996 (SI 1996/943), §22(6) in relation to the application of *ibid.*, §§19(2) ('major treaty reinsurers') and 20(1)(a)-(c) ('major facultative reinsurers') to Members collectively.

¹¹⁸ Due to be replaced shortly: see for example CP 04/7, §1.18.

¹¹⁹ IPRU(INS), §1.2.

¹²⁰ See relevant changes discussed in CP 04/7.

¹²¹ LLD, §9.1.2G.

¹²² See for example Life Solvency Directive and Non-Life Solvency Directive.

¹²³ See LLD, Ch. 11 ('required margins of solvency'); see formerly Lloyd's Solvency Test Regulations (as amended (so far as presently relevant) by Insurance (Lloyd's) Regulations 1997 (SI 1997/686)), especially §§3, 3A, 3B and *ibid.*, Sch. 1A; Sch. 3, §3A. And see incidentally CP 16, §97; CP 16 solvency, §7 *et seq.* LLD, Ch. 11 will be amended: see the detailed provisions at CP 04/7.

¹²⁴ See generally FSMA 2000, Part XXI (ss.334-339); Financial Services and Markets Act 2000 (Mutual Societies) Order 2001 (SI 2001/2617). Except in relation to (traditionally a material amount of PSLI and re-) insurance bought by SYA participants from other SYA participants, CU funds at Lloyd's are intended for third party assureds-at-Lloyd's. This similarly distinguishes the Lloyd's enterprise from, say, a P&I club.

¹²⁵ See historically CP 16, §95; PS 16, §34 *et seq.* *Ibid.*, §34:-

Several respondents argued that the "combined" solvency test had made the others — the "global" and "individual" solvency tests — redundant and that retaining the global test was seriously misleading because it implicitly assumed — incorrectly — that all members' admissible assets were available to meet all the liabilities. We accept the validity of these criticisms and therefore propose to retain only the "combined" solvency test provided this can be made compatible with the requirements of European law.

See the discussion at CP 16 solvency, §11 *et seq.*

¹²⁶ See CP 16 solvency, §10 ('Passing the combined test on its own gives virtual certainty that Lloyd's is thereby in compliance with the solvency requirements of the [First Non-Life] Directive').

both Member- and SYA-level as appropriate, assists in evaluating the test by elucidating how insurance liabilities are incurred, securitised and discharged at Lloyd's (an exercise that no external insurance regulator appears to have conducted);

(2) the external insurance regulatory so-called 'global solvency' test¹²⁸ (treating all SYA participants plus the Corporation as a single insurance enterprise¹²⁹) has been abandoned;¹³⁰

(3) the external insurance regulatory Member-level 'individual' test¹³¹ (outside this work's scope¹³²) is administered in the BO by self-regulators-at-Lloyd's. Individual SYA participants' insurance (*cf.* general personal, commercial, professional, etc.) solvency (and insolvency) is, in relation to assureds-at-Lloyd's in BBSN circumstances, an irrelevant BO matter; and in relation to the FSA, a relevant BO self-regulatory matter in which the FSA has no direct participation. The significance of the individual SYA participant is discussed elsewhere.¹³³

recent changes to solvency regulation: CP 184 and CP 04/7

- 1.12 The FSA has implemented temporarily,¹³⁴ in the current version of LLD, Chapter 11¹³⁵ ('Required margins of solvency'), relevant provisions of the Non-Life Solvency Directive (this Edition takes those changes into account). The FSA's recent CP 04/7 presages further relevant changes, intended to take effect from January 1, 2005,¹³⁶ including to capital adequacy rules ('Enhanced Capital Requirements') governing components of the Lloyd's enterprise, some of which new rules¹³⁷ will affect solvency. These changes will be dealt with in subsequent Editions of the present work.

¹²⁷ See (for example) the recent summary at Richard J. Astor, *Liability on an Insurance Contract Made at Lloyd's* (Torts, Insurance & Compensation Law Section Journal (New York State Bar Association), Winter 2004, vol. 33, no. 1, p.18). A full discussion is at *Astor's Law of Lloyd's*, 2nd Ed.

¹²⁸ See Lloyd's Solvency Test Regulations (as amended (so far as presently relevant) by Insurance Companies Regulations 1994 (SI 1994/1516)), especially Sch. 1. And see incidentally CP 16, §95; CP 16 solvency, §6.

¹²⁹ And see incidentally CP 16 solvency, §6.

¹³⁰ See for example PS 16, §34 etc.

¹³¹ See relevant BO self-regulatory provisions, discussed at *Astor's Law of Lloyd's*, 2nd Ed. See incidentally CP 16, §96; CP 16 solvency, §5.

¹³² It is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

¹³³ See ¶2.72 *et seq.*

¹³⁴ See CP 178, §1.12:-

We must have rules in place by September this year that set out how we will implement the new EU directive (Solvency 1) for financial years beginning on or after 1 January 2004. The revised rules that we will develop through our review of prudential rules will implement Solvency 1. However, we will not make those revisions by the Solvency 1 implementation deadline. So, we propose to make changes to the Lloyd's Sourcebook (LLD) as an interim solution, on which we will consult next month, in the "Miscellaneous amendments to the Handbook No.8" CP, with a two month consultation period. As we expect to replace those LLD rules in due course, we intend to keep changes to LLD to the minimum required by the directive.

See subsequently CP 184, Chapter 5 and *ibid.*, Annex 4, and see now the current version of LLD, Ch. 11. See subsequently CP 04/7, §1.6 ('We also consulted last year on the implementation of the Solvency 1 Directive for Lloyd's (2000/13/EC), which we propose to implement in future through PRU').

¹³⁵ See for example present LLD, §11.1.7: 'The rules in this chapter implement the Solvency 1 Directives (2002/12/EC and 2002/13/EC) in respect of Lloyd's'. Historically, see CP 184, Chapter 5; *ibid.*, Annex 4.

¹³⁶ See CP 04/7, §1.1.

¹³⁷ See particularly CP 04/7, Chapter 2 and *ibid.*, Annex 8.

minimum solvency requirements generally

- 1.13 The FSA's minimum¹³⁸ solvency requirements on the Lloyd's enterprise — 'which have a similar effect on Lloyd's as a whole to those [see IPRU(INS), Chapter 2] imposed on insurers'¹³⁹ — are presently¹⁴⁰ set out principally in LLD, Ch. 11 ('Required margins of solvency'), which is directed to the Corporation.¹⁴¹ The FSA considers¹⁴² that the Corporation is required to 'assess the actual risks arising from its activities and the insurance business carried on at Lloyd's by its members and to ensure the adequacy of the assets and other resources available to support those risks'.¹⁴³ The Corporation's contravention of Ch. 11 is not actionable by a private litigant under FSMA 2000, s.150.¹⁴⁴

various solvency margins

- 1.14 The "member's margin"¹⁴⁵ and the "Society margin"¹⁴⁶ (together with the requirement that the Corporation maintain "net central assets" to cover any shortfalls) are similar to the "required minimum margin"¹⁴⁷ for "insurers".¹⁴⁸ The "required minimum margin" and the "guarantee fund" must, under IPRU(INS), at least equal the IPRU(INS), §2.9-defined¹⁴⁹ "minimum guarantee fund".¹⁵⁰ The "Society margin" and the "Society guarantee fund"¹⁵¹ must at least equal the "minimum guarantee fund" which would apply if Members collectively (by which is meant SYA stamps collectively) constituted one insurer, other than a mutual, authorised for all classes of "general insurance business"¹⁵² carried out and carried on¹⁵³ at Lloyd's.¹⁵⁴

138 LLD, §11.1.5G.

139 LLD, §11.1.3G.

140 On further changes to the present version of LLD, Ch. 11, see for example CP 04/7, §1.6 ('We ... consulted last year [see CP 184, Ch. 5 ('Amendments to the Lloyd's sourcebook') and *ibid.*, Annex 4 ('Proposed amendments to the Lloyd's sourcebook')] on the implementation of the Solvency 1 Directive for Lloyd's (2000/13/EC), which we propose to implement in future through PRU' — on which see specifically CP 04/7, Annex 8). See also (for example) CP 181, §§1.5, 2.10; PS 181, §2.5, etc.

141 LLD, §11.1.1R.

142 LLD, §11.1.5G.

143 LLD, §11.1.5G.

144 LLD, §11.1.2R.

145 Per FSA Glossary, 'the amount determined in accordance with "LLD" 11.3.1R (General insurance business) or "LLD" 11.3.4R (Long-term insurance business)'. The phrase perfectly illustrates the FSA's failure to distinguish between SYA-level and Member-level liabilities.

146 Per FSA Glossary, 'the margin calculated by the "Society" under LLD 11.5.1R'.

147 Per FSA Glossary, "required minimum margin": 'for an "insurer", the minimum margin required by "IPRU(INS)". See *Penrose*, 547 ('The Society's cover for the RMM was clearly a key index').

148 LLD, §11.2.8G. See in similar vein *ibid.*, §11.2.9G ('...assets must exceed liabilities by the guarantee fund...') and *ibid.*, 11.2.10G.

149 See FSA Glossary, definition of "minimum guarantee fund". And see IPRU(INS), App. 2.3.

150 LLD, §11.5.3G.

151 Per FSA Glossary, 'the guarantee fund calculated by the "Society" under "LLD" 11.5.2R'.

152 Per FSA Glossary, "general insurance business": 'the business of "effecting" or carrying out general insurance contracts'. The phrase 'carrying out general insurance contracts' is FSA-italicised but not defined in FSA Glossary. The phrase 'carrying out contracts of insurance' does have a FSA Glossary definition, *viz.*, 'the "regulated activity", specified in article 10(2) of the Regulated Activities Order (Effecting and carrying out contracts of insurance), of carrying out a "contract of insurance" as principal'.

153 On the FSA phrases 'carry out' (to perform, presumably) and 'carry on' (to conduct, presumably), see respectively (for example) FSA Glossary, definition of "carrying out contracts of insurance" and FSMA 2000, s.315(2) (the Corporation 'has power to carry on ...').

154 LLD, §11.5.3G.

premiums basis

- 1.15** The LLD, §11.3.1R premiums¹⁵⁵ basis¹⁵⁶ for determining solvency for each "member" is — subject¹⁵⁷ to *ibid.*, §§11.4.2R, 11.4.6R and 11.4.9R — his 'share'¹⁵⁸ of the "general insurance business premiums"¹⁵⁹ "receivable" (or one-third of his share for "actuarial health insurance"¹⁶⁰) in the previous financial year multiplied by 16%¹⁶¹ of the factor¹⁶² determined under *ibid.*, §11.4.11R. Generally,¹⁶³ the amounts of

¹⁵⁵ See GSA Glossary, detailed definition of "premium". The word 'premiums' in LLD, Ch. 11 is not italicised and therefore not a technical term.

¹⁵⁶ Cf. IPRU(INS), App. 2.1.

¹⁵⁷ LLD, §11.4.8R, and see *ibid.*, §11.4.6R: In determining for each "member" the amount of "general insurance business" premiums "receivable" in a period for the purposes of LLD 11.4.8R (and *ibid.*, 11.4.11R), premiums under contracts of reinsurance accepted shall be included, but amounts "receivable" under contracts of "reinsurance to close" accepted shall be excluded. (See *ibid.*, §11.4.10G: 'Liabilities subjected to reinsurance to close are treated as having been written originally by members of the accepting syndicate year, rather than of the ceding syndicate year.' And see *ibid.*, §11.3.6R re mathematical reserves: 'Mathematical reserves (both before and after deduction of reinsurance cessions) and capital at risk must be calculated as if every reinsurance to close were a transfer of engagements.' — and see *ibid.*, §11.3.7G: 'The purpose of LLD 11.3.6R is to ensure that each member's margin applicable to a financial year is calculated by reference to his participation as at the start of the financial year.') *Per ibid.*, §11.4.2: the member's share of premiums receivable and claims incurred: (1) excludes amounts in respect of syndicate years which have been closed into open syndicate years in which the member did not participate at the end of the previous financial year; but (2) includes amounts, determined under *ibid.*, §11.4.4R (on which see *ibid.*, §11.4.5G), in respect of "syndicate years" which have been closed into open "syndicate years" in which the SYA participant participated at the end of the previous financial year. And see *ibid.*, §11.4.3: The 'member's share' includes amounts in respect of open "syndicate years" in which he participated at the end of the previous financial year. And see *ibid.*, §11.4.4R. In *ibid.*, §11.4.2R the 'member's share' for a closed "syndicate year" is to be determined by reference to his participation in the open "syndicate year" into which it has been closed. The wording is highly infelicitous.

¹⁵⁸ LLD, §11.4.9G: for the purpose of calculating each member's 'share' of general insurance business premiums under LLD §11.4.8R, premiums in respect of classes 11, 12 and 13 of general insurance business (see Annex 11.2 of IPRU(INS)) must be increased by 50% for both general insurance business premiums earned and general insurance business premiums receivable; statistical methods may be used to allocate the premiums in respect of these classes. The concept of a SYA participant having a share of his own assets and liabilities is self-evidently flawed: a SYA participant conducts his own insurance business, however much that business maybe collectivised with those of other SYA participants.

¹⁵⁹ These four words are FSA-italicised, but the four-word phrase is not FSA Glossary-defined (cf. similar phrases such as "general insurance business assets" and "general insurance business liabilities").

¹⁶⁰ LLD, §11.4.1R: In LLD §§11.4.8R and 11.4.13R, "actuarial health insurance" means "general insurance business" which is sickness insurance and satisfies the following conditions: (1) the gross premiums receivable are calculated on the basis of sickness tables appropriate to insurance business; (2) the reserves include provision for increasing age; (3) an additional premium is collected in order to set up appropriate additional prudential provisions; (4) it is not possible for the member or syndicate to cancel the contract after the end of the third year of insurance; and (5) the contract provides for the possibility of increasing premiums or reducing benefits during its currency. *Per* LLD, §11.4.2R, the member's share of premiums receivable and claims incurred: (1) excludes amounts in respect of syndicate years which have been closed into open syndicate years in which the member did not participate at the end of the previous financial year; but (2) includes amounts, determined under *ibid.*, §11.4.4R, in respect of "syndicate years" which have been closed into open "syndicate years" in which the SYA participant participated at the end of the previous financial year. Note the infelicitous language.

¹⁶¹ And see LLD, §11.4.10G.

¹⁶² LLD, §11.4.11R: the "factor" is the ratio for all members taken together of general insurance business premiums receivable in the previous financial year net of inter-syndicate reinsurance premiums, to those premiums before deducting inter-syndicate reinsurance premiums. And see *ibid.*, §11.4.6R: In determining for each "member" the amount of "general insurance business" premiums "receivable" in a period for the purposes of *ibid.*, 11.4.11R (and also *ibid.*, §11.4.8R), premiums under contracts of reinsurance accepted shall be included, but amounts "receivable" under contracts of "reinsurance to close" accepted shall be excluded. (And see *ibid.*, §11.4.10G: 'Liabilities subjected to reinsurance to close are treated as having been written originally by members of the accepting syndicate year, rather than of the ceding syndicate year.')

premiums and claims are to be determined according to accounting principles and rules contained in insurance accounts rules and generally accepted accounting practice,¹⁶⁴ and should therefore exclude amounts arising from 'contracts' that are not insurance or reinsurance under generally accepted accounting practice.¹⁶⁵ For each "member", his share of the "general insurance business" premiums is either his share calculated for "general insurance business" premiums earned, or that calculated for "general insurance business" premiums receivable, whichever is the higher.¹⁶⁶

- 1.16** Concerning solvency in relation to liability for non-life products, First Non-Life Directive, §16.5: 'In the case of Lloyd's, the calculation of the first result [premiums basis] in respect of premiums, referred to in paragraph 3, shall be made on the basis of net premiums, which shall be multiplied by a flat-rate percentage fixed annually by the internal auditor. This flat-rate percentage must be calculated on the basis of the most recent statistical data on commissions paid. The details, together with the relevant calculations shall be sent to the authorities of the countries where Lloyd's is established.' Concerning solvency in relation to liability for life products, First Life Directive, §19 states: 'In the case of underwriters known as Lloyd's, the calculation of the solvency margin shall be made on the basis of net premiums, which shall be multiplied by [a] flat-rate percentage fixed annually by the supervisory authority of the head-office Member State. This flat-rate percentage must be calculated on the basis of the most recent statistical data on commissions paid. The details together with the relevant calculations shall be sent to the supervisory authorities of the countries in whose territory Lloyd's is established.'

claims basis

- 1.17** The LLD §11.3.1R claims basis¹⁶⁷ for determining solvency for each "member" is — subject¹⁶⁸ to *ibid.*, §11.4.13AR¹⁶⁹ — his 'share',¹⁷⁰ determined under *ibid.*, §11.4.2R, of the "general insurance business claims"¹⁷¹ incurred (or one-third of his share in the case of "actuarial health insurance") in the three previous financial years divided by three and multiplied by 23%¹⁷² of the factor¹⁷³ determined under

¹⁶³ *Viz.*, subject to LLD, §§11.4.2R, 11.4.4R and 11.4.6R: LLD, §11.4.7G.

¹⁶⁴ LLD, §11.4.7G.

¹⁶⁵ LLD, §11.4.7G.

¹⁶⁶ LLD, §11.4.8R.

¹⁶⁷ *Cf.* IPRU(INS), App. 2.2.

¹⁶⁸ LLD, §11.4.13R.

¹⁶⁹ LLD, §11.4.13AR: claims, provisions and recoveries in respect of classes 11, 12 and 13 of "general insurance business" (see Annex 11.2 of IPRU(INS)) must be increased by 50%; statistical methods may be used to allocate the claims, provisions and recoveries in respect of those classes.

¹⁷⁰ LLD, §11.4.13R.

¹⁷¹ These four words are FSA-italicised. While "general insurance business" is FSA Glossary-defined, neither 'general insurance business claims' nor 'claims' is; nor is 'claims' italicised; *cf.* "claim" — '(in "LLD", "SUP" and "TC") a claim under a "contract of insurance"'. On a singular FSA term including the plural, see (for example) GEN, §2.2.12G(3)(b); Reader's Guide, §61; FSA Glossary, §7(1) (and presumably in a number of other FSA emissions). Either 'claims' is to be treated as the plural of "claim" and the lack of italicisation is an error, or it is intended to be construed differently to 'claim' but is not defined.

¹⁷² See LLD, §11.4.15G: In setting the claims basis at 23% of the annual average of claims incurred in the three year period (and one-third of this for actuarial health insurance), LLD §11.4.13R is similar to the corresponding calculation for insurers. Liabilities subjected to reinsurance to close are treated as having been written originally by members of the accepting "syndicate year", rather than the ceding "syndicate year".

ibid., §11.4.17R.¹⁷⁴ For a particular "member", the claims basis referred to in *ibid.*, §11.3.1R is nil if: (1) every open "syndicate year" in which the member participated at the end of the previous financial year; and (2) every other "syndicate year" which has been closed¹⁷⁵ into any such open "syndicate year"; commenced after the start of the third last previous financial year.¹⁷⁶

relevant assets

the Corporation's assets

- 1.18** LLD, Ch. 9 ('Prudential requirements for the Society') makes clear¹⁷⁷ that the Corporation's personal assets are to be sufficient,¹⁷⁸ and available, to meet claims on insurance contracts made at Lloyd's. For example, *ibid.*, §9.2.5¹⁷⁹ requires the Corporation to ensure that its own personal assets and the assets of "members"¹⁸⁰ are 'adequate' to meet the liabilities which "members" assume in their "insurance business" at Lloyd's, 'having regard to the availability and value of the "central assets" of the "Society"'.¹⁸¹ Indeed, the FSA's 'central prudential safeguard' is for the Corporation personally to maintain sufficient net assets to cover 'any shortfall' in "members'" resources.¹⁸²
- 1.19** Separately, LLD, §11.2.1R¹⁸³ ('the central financial requirement placed on the Society'¹⁸⁴) requires the Corporation to maintain 'available "net central assets"¹⁸⁵ which

¹⁷³ LLD, §11.4.17R: The factor referred to in LLD §11.4.13R is the ratio for all "members" taken together of "general insurance business claims" paid in the three previous "financial years" net of "inter-syndicate reinsurance recoveries", to those "claims" before deducting "inter-syndicate reinsurance recoveries".

¹⁷⁴ LLD, §11.4.13R.

¹⁷⁵ Presumably by a permitted form of RTC. RTC is outside this work's scope. A detailed exegesis is at *Astor's Law of Lloyd's*, 2nd Ed.

¹⁷⁶ LLD, §11.4.16R.

¹⁷⁷ See for example LLD, §9.1.4G:-

The purpose of this chapter and LLD 10 to LLD 15 is to: (1) protect policyholders against the risk that the Society and members may not have adequate financial resources to meet claims as they fall due; (2) promote confidence in the market at Lloyd's by requiring the Society, and through it members, to maintain resources which are adequate to meet their liabilities

¹⁷⁸ Historically see for example CP 16, §95.

¹⁷⁹ And see for example LLD, §13.1.5G.

¹⁸⁰ Not the infelicitous failure to distinguish between each SYA participant maintaining (SYA-level, Member-level (if still a Member) or other) assets to discharge his own outstanding SYA-level insurance liabilities and each Member maintaining assets to discharge Member-level liabilities.

¹⁸¹ Per FSA Glossary, "Society" means the Corporation, not Members or SYA participants collectively or any other component of the Lloyd's enterprise.

¹⁸² LLD, §9.3.5G. And see *ibid.*, §9.3.6G etc.

¹⁸³ And see for example LLD, §13.1.5G: 'LLD 11.2.1R requires the Society to assess the financial position of each member and to maintain sufficient net central assets to cover at least the total of members' solvency deficits'.

¹⁸⁴ LLD, §11.2.3G; it is not clear what 'the central financial requirement' is intended to mean.

¹⁸⁵ Per FSA Glossary, "net central assets":-

"central assets" less the liabilities of the "Society" (excluding the liabilities of "members" valued in accordance with "LLD" 9 to 15.

Per *ibid.*, "central assets" (so far as presently relevant):-

assets that the "Society" owns and amounts that "members" are liable to pay to the "Society" (or may by resolution of the "Council" be liable to pay) as contributions to the "Central Fund" (excluding amounts which, if paid by a "member", would cause his assets to fall short (or shorter) of the "required amount").

Per *ibid.*, "required amount" (so far as presently relevant):-

for a "member", in relation to "general insurance business" or "long-term insurance business", the required amount determined in accordance with "LLD" 11.2.6R or "LLD" 11.2.7R.

are 'adequate' (*cf.* sufficient) to cover the 'aggregate' (which presumably means the gross total) of five amounts:-

(1) for each "member", the amount by which his "general insurance business assets"¹⁸⁶ are less than the "required amount"¹⁸⁷ calculated under LLD, §11.2.6R.¹⁸⁸ For each "member", the "required amount" for "general insurance business"¹⁸⁹ is the aggregate of his "general insurance business liabilities"¹⁹⁰ and the (retrospective¹⁹¹) "member's margin" for "general insurance business", calculated under *ibid.*, §11.3.1R¹⁹² and any amount attributed to him under *ibid.*, §11.2.-2R.¹⁹³ A "member's margin" for "general insurance business" is the higher of the amounts determined under: (a) *ibid.*, §11.4.8R (the premiums basis); and (b) *ibid.*, §11.4.13R and *ibid.*, §11.4.16R (the claims basis); multiplied, to allow for outward reinsurance, by the netting-down percentage¹⁹⁴ determined under *ibid.*, §11.4.20R;¹⁹⁵

¹⁸⁶ Per FSA Glossary, "general insurance business assets":-

(in "LLD") assets of a "member" that are: (a) in a "premium trust fund" for "general insurance business"; or (b) "funds at Lloyd's" that are not "long-term insurance business assets".

Per *ibid.*, "premium trust fund":-

a trust fund into which "premiums" [not defined] "receivable" by "members" are paid in compliance with a trust deed under "LLD" 10.3 (Carrying of insurance receivables to trust funds).

Per *ibid.*, "funds at Lloyd's":-

assets of "members" held by the "Society", not being part of their "premium trust funds", available to meet the liabilities arising from their "insurance business" at Lloyd's.

Per *ibid.*, "premium":-

(1) (in relation to a "general insurance contract") the consideration payable under the contract by the "policyholder" to the "insurer". (2) (in relation to a "long-term insurance contract") a payment under the contract; (except in "SUP" 16.8 (Persistency reports from insurers)) a premium is a regular premium if it is one of a series of payments under the contract: (a) (i) which are payable on dates that are certain or ascertainable at the time the contract is made; (ii) which are payable over a period that exceeds one year in length; and (iii) assuming the "policy" evidencing the contract is not surrendered or otherwise terminated before the "premiums" fall due, will fall due on those dates without either party to the contract exercising any option under the contract; or (b) of which the first payment is an obligation under the contract, and subsequent payments, calculated according to an agreed formula, are payable over a period which exceeds one year in length under a collateral written arrangement with the "insurer" or "friendly society". ...

Per *ibid.*, "receivable":-

(in "LLD") (in relation to a "member", a period and a "premium") a "premium" due to the "member" in respect of "contracts of insurance" effected during the period, whether or not the "premium" is received during that period.

¹⁸⁷ LLD, §11.2.13R speaks of and defines a "lower required amount" for "general insurance business". LLD, §11.2.13R(1)-(3): for each "member", the "lower required amount" for "general insurance business" is the aggregate of: (1) his "general insurance business liabilities"; (2) one-third of the "member's margin" for "general insurance business", calculated under LLD §11.3.1R; and (3) one-third of any amount attributed to that "member" under LLD §11.2.-2R.

¹⁸⁸ LLD, §11.2.1R(1).

¹⁸⁹ Per FSA Glossary, "general insurance business": 'the business of "effecting" or "carrying out general insurance contracts"'.

¹⁹⁰ LLD, §11.2.6(1)R. Per FSA Glossary, "general insurance business liabilities": 'liabilities of a "member" that are not to be left out of account under "LLD" 12.5.4R, and are not "long-term insurance business liabilities"'.

¹⁹¹ LLD, §11.3.2: the "member's margin" applying throughout a financial year depends on premiums receivable during the previous 'financial year', or on claims incurred during the three previous 'financial years', multiplied in each case by a ratio derived primarily from claims incurred in the previous three financial years.

¹⁹² LLD, §11.2.6(2)R.

¹⁹³ LLD, §11.2.6(3)R.

¹⁹⁴ LLD, §11.4.20: for each "member" the netting-down percentage referred to in *ibid.*, §11.3.1R is: (1) where the ratio determined under *ibid.*, §11.4.19R is greater than 100%, 100%; or (2) the ratio determined under *ibid.*, §11.4.19R, where it is greater than 50%, but not greater than 100%; or (3) in any other case, 50%. Per *ibid.*, §11.4.19, for the purposes of *ibid.*, §11.4.20R and subject to *ibid.*, §11.4.2R, the ratio for

(2) for each "member", the amount by which his "long-term insurance business assets"¹⁹⁶ are less than the "required amount" calculated under LLD, §11.2.7R.¹⁹⁷ For each "member", the "required amount"¹⁹⁸ for "long-term insurance business"¹⁹⁹ is the aggregate of his "long-term insurance business liabilities"²⁰⁰ and the (retrospective²⁰¹) "member's margin" for "long-term insurance business" calculated under *ibid.*, §11.3.4R.²⁰² A "member's margin" for "long-term insurance business" is the "required margin of solvency"²⁰³ which would apply to the "member" for his "long-term insurance business" if the "member" were an "insurer" and that requirement were modified as in *ibid.*, § 11.3.6R,²⁰⁴

(3) the amount by which the "Society margin",²⁰⁵ less any increase resulting from the operation of IPRU(INS), §2.4(6), exceeds the sum for all "members" of the

each "member" is the ratio for the three previous financial years of his share of net (of reinsurance) claims incurred to his share of gross claims incurred divided by the factor determined under *ibid.*, §11.4.21R, viz., the ratio for all members taken together of general insurance business claims paid in the previous financial year net of inter-syndicate reinsurance recoveries, to those claims before deducting inter-syndicate reinsurance recoveries. Per LLD, §11.4.2R in relation to *ibid.*, §11.4.19R, the member's share of premiums receivable and claims incurred: (1) excludes amounts in respect of "syndicate years" which have been closed into open "syndicate years" in which the SYA participant did not participate at the end of the previous financial year; but (2) includes amounts, determined under *ibid.*, §11.4.4R, in respect of "syndicate years" which have been closed into open "syndicate years" in which the SYA participant participated at the end of the previous financial year. Note the infelicitous language.

¹⁹⁵ LLD, §11.3.1R.

¹⁹⁶ Per FSA Glossary, "long-term insurance business assets":-

assets of a "member" that are: (a) in a "premium trust fund" for "long-term insurance business"; or (b) "funds at Lloyd's" that are, for the time being, identified as available to meet "long-term insurance business liabilities" of the "member".

¹⁹⁷ LLD, §11.2.1R(2). And see OCFB, §8A(2), which provides that where at any time the "general insurance business assets" or the "long term insurance business assets" of a Member are less than the required amount calculated under LLD, §11.2.7R, the Council may direct that monies or other assets in the Central Fund or any other monies or assets of the Corporation be put in trust, charged, appropriated or set apart, conditionally or otherwise 'with a view' to their relevant application out of the Central Fund: *q.v.* for detailed provisions. See similarly NCFB, §9(2).

¹⁹⁸ LLD, §11.2.14R speaks of and defines a "lower required amount" for "long-term insurance business". 11.2.14R: for each "member", the "lower required amount" for "long-term insurance business" is the aggregate of: (1) his "long-term insurance business liabilities; and (2) one-third of the "member's margin" for "long-term insurance business", calculated under *ibid.*, §11.3.4R.

¹⁹⁹ Per FSA Glossary, "long-term insurance business": 'the business of "effecting" or "carrying out" "long-term insurance contracts'. And see *ibid.*, definitions of 'carrying out contracts of insurance' and 'long-term insurance contract'. Conceptually, linguistically, terminologically and regulatorily infelicitously, "long-term" does not include long tail non-life.

²⁰⁰ LLD, §11.2.7(1)R. Per FSA Glossary, "long-term insurance business liabilities": 'liabilities of a "member" that are attributable to his "long-term insurance business"'.

²⁰¹ LLD, §11.3.2G: the "member's margin" applying throughout a financial year depends on premiums receivable during the previous 'financial year', or on claims incurred during the three previous 'financial years', multiplied in each case by a ratio derived primarily from claims incurred in the previous three financial years.

²⁰² LLD, §11.2.7(2)R.

²⁰³ Per FSA Glossary, "required margin of solvency" (so far as presently relevant): 'a "margin of solvency" required by "IPRU(INS)" ...'. Per *ibid.*, "margin of solvency" (so far as presently relevant): 'the excess of the value of an "insurer"'s assets over the amount of its liabilities, that value and amount being determined in accordance with "IPRU(INS)" ...'.

²⁰⁴ LLD, §11.3.4R.

²⁰⁵ Viz., the required minimum margin that the Corporation would have to maintain under IPRU(INS), Chapter 2 ('Margins of solvency') if it were an insurer carrying on all the general insurance business carried on by Members, but eliminating inter-syndicate reinsurance: LLD, §11.5.1R. The Corporation is

"members' margins" for "general insurance business".²⁰⁶ If IPRU(INS) §2.4(6) operates to increase the "Society margin", the Corporation may attribute all or part of that increase to a "member" by increasing that "member's" "required amount", *per* LLD, §11.2.6R.²⁰⁷ If the Corporation relies on *ibid.*, §11.2.-2R to attribute any part of the increase in the "Society margin" to a "member", it must establish and use a 'reasonable and transparent methodology' for making that attribution;²⁰⁸

(4) the excess (if any) of 3,000,000²⁰⁹ Euros (using the conversion rate notified by the FSA from time to time for this purpose) over the sum for all "members" of the "members' margins" for "long-term insurance business";²¹⁰ and

(5) the amount of any increase in the "Society margin" resulting from the operation of IPRU(INS), §2.4(6) that is not attributed to a "member" or "members" under LLD, §11.2.-2R.²¹¹

1.20 *Per* the FSA's integrated interpretative gloss,²¹² LLD, §11.2.1R requires the Corporation to 'perform an assessment of the financial position of each "member", to the extent necessary to confirm continuing compliance with *ibid.*, §11.2.1R'²¹³, and the Corporation will require 'sufficient funds centrally'²¹⁴ to cover the 'total' of:-

(1) any shortfall in the assets of "members" when, individually, their assets are less than the sum of their liabilities and a "member's margin", calculated according to formulae set out in LLD, §11.3.1R and *ibid.*, §11.3.4R;²¹⁵

(2) any adjustment required of the Corporation when the total of "members' margins" is less than the result would have been had the Corporation been treated as a single insurer and applied the relevant solvency test to itself;²¹⁶ and

(3) any amount of the increase in the "Society margin" resulting from the operation of IPRU(INS) §2.4(6) that the Corporation does not or cannot attribute to a "member" or "members", by increasing the required amounts of those "members" under LLD, §11.2.-2R.²¹⁷

permitted to make appropriate approximations, taking reasonable care to avoid underestimating the Society margin: LLD, §11.5.5G.

²⁰⁶ LLD, §11.2.1R(3).

²⁰⁷ LLD, §11.2.-2R.

²⁰⁸ LLD, §11.2.-1R.

²⁰⁹ LLD, §11.2.15R: that amount will increase every 'year', (*ibid.*, §11.2.15(1)) 'starting' (*ibid.*, §11.2.15(1); but see *ibid.*, 11.1.15(3) on effective date) on the first 'review date' of September 20, 2003 by the percentage change (if 5% or more: *ibid.*, §11.2.15(2)) in the European index of consumer prices (comprising all EU member states as published by Eurostat) from 20 March 2002 to the relevant review date, rounded up to a multiple of 100,000 Euro.

²¹⁰ LLD, §11.2.1R(4).

²¹¹ LLD, §11.2.1R(5).

²¹² See LLD, §11.2.3G and, indeed, like 'G's.

²¹³ LLD, §11.2.3G.

²¹⁴ LLD, §11.2.3G.

²¹⁵ LLD, §11.2.3(1)G.

²¹⁶ LLD, §11.2.3(2)G.

²¹⁷ LLD, §11.2.3(3)G.

insurance of the Central Fund

- 1.21 Mere theoretical insurance of the Central Fund is not taken into account in the 'combined' solvency test.²¹⁸

assets already in FAL: the 'callable layer'

- 1.22 Where a particular asset is already FAL and available to meet the liabilities of more than one "member" (interavailable funds), the Corporation is permitted to allocate that asset (net of any attaching liability) between those "members" for the purpose of LLD, §11.2.1R 'as it considers appropriate'.²¹⁹

OPW not taken into account

- 1.23 A SYA participant's OPW is left out of account when calculating solvency in accordance with LLD, Chapters 9 to 15.²²⁰

failure to have sufficient "net central assets"

- 1.24 Were the Corporation to fail to maintain "net central assets" as required under LLD, §11.2.1R, the FSA 'would expect to require'²²¹ the Corporation to prepare and submit a plan for the restoration of a sound financial position similar to that required from insurers by SUP App 2 1.3, 'and other remedies might also apply, including the FSA's exercise of its own-initiative power under section 45 of the Act'.²²² Similarly, the FSA 'would expect to require'²²³ the Corporation to prepare and submit a short-term financial scheme similar to that required from insurers by SUP App 2 1.4 if the Corporation had "net central assets" 'inadequate'²²⁴ or likely to be 'inadequate' to cover the 'aggregate' of: (1) for each "member", the amount by which his "general insurance business assets" are less than the "lower required amount" calculated under LLD, §11.2.13R; (2) for each "member", the amount by which his "long-term insurance business assets" are less than the "lower required amount" calculated under *ibid.*, §11.2.14R; (3) the amount by which the "Society guarantee fund",²²⁵ less any increase resulting from the operation of IPRU(INS) 2.4(6), exceeds one-third of the sum for all "members" of the "members' margins" for "general insurance business"; (4) the excess (if any) of 3,000,000²²⁶ Euros over one-

²¹⁸ See incidentally CP 16 solvency, §19-20. *Ibid.*, §20:-

We accept that the recognition of actual central assets and the Callable Layer but not the intermediate tier of protection provided by the [Central Fund] insurance makes it more difficult for the user of the returns to understand the test. However there is a fundamental difficulty in that the [First Non-Life] Directive does not allow us to recognise insurance or reinsurance cover as an admissible asset counting toward solvency. Where an event leading to a claim has occurred and an insurance debt recognisable under normal accounting principles has been created, then the debt is admissible and can count toward solvency. In this instance, we would expect the asset created to be shown as part of the assets comprising the central assets of the Society. Until the protection is called on it cannot be recognised as an asset.

²¹⁹ LLD, §11.2.2G. See CP 16 solvency, §16 *et seq.*

²²⁰ LLD, §9.3.7G.

²²¹ LLD, §11.2.5G.

²²² LLD, §11.2.5G.

²²³ LLD, §11.2.12G.

²²⁴ LLD, §11.2.11R.

²²⁵ *Viz.*, the guarantee fund that the Corporation would have to maintain under IPRU(INS) 2 (Margins of solvency) if it were an insurer carrying on all the general insurance business carried on by its members, but eliminating inter-syndicate reinsurance: LLD, §11.5.2R. The Corporation is permitted to make appropriate approximations, taking reasonable care to avoid underestimating the Society guarantee fund: *ibid.*, §11.5.5G.

²²⁶ LLD, §11.2.15G: that amount will increase every 'year', (*ibid.*, §11.2.15(1)) 'starting' (*ibid.*, §11.2.15G(1); but see *ibid.*, §11.1.15G(3) on effective date) on the first 'review date' of September 20, 2003 by the percentage change (if 5% or more: *ibid.*, §11.2.15G(2)) in the European index of consumer prices (compris-

third of the sum for all "members" of the "members' margins" for "long-term insurance business"; (5) one-third of the amount of any increase in the "Society margin" resulting from the operation of IPRU(INS), §2.4(6) that is not attributed to a "member" under LLD, §11.2.-2R.²²⁷

valuation

- 1.25** Valuation of relevant assets is addressed at (for example²²⁸): (1) LLD, Ch. 13 ('Assets: valuation and realisability risk').²²⁹ That Chapter (among other things) requires the Corporation ("the Society") to identify and value its own personal assets in accordance with LLD, Chs. 13-14;²³⁰ and to take 'all reasonable steps' to ensure the identification and valuation, in accordance with LLD, Chs. 13 and 14, of each Member's "admissible assets";²³¹ (2) *ibid.*, Ch. 14 ('Assets: market and credit risk').

relevant liabilities

orientation

- 1.26** Relevant liabilities are addressed at LLD, Ch. 12 ('Determination of liabilities'),²³² relevant requirements in which apparently 'provide safeguards against the risk that insurance liabilities will be underestimated'.²³³ *Ibid.* appears to make no consistent or intelligible attempt to clarify — indeed, it appears somewhat to obscure²³⁴ — the regulatory-solvency-related distinction between a SYA participant's SYA-level liabilities,²³⁵ a Member's Membership-level liabilities,²³⁶ and the Corporation's personal liabilities.²³⁷ Significant aspects of *ibid.* (a detailed consideration of which is outside this Edition's scope) include (for example):-

(1) the apparent distinction, as at LLD, §12.2.1R,²³⁸ between the Corporation's personal liabilities and SYA participants' SYA-level liabilities;

ing all EU member states as published by Eurostat) from 20 March 2002 to the relevant review date, rounded up to a multiple of 100,000 Euros.

²²⁷ LLD, §11.2.12G read with *ibid.*, §11.2.11(1)-(5)R.

²²⁸ The detailed requirements of relevant accounting rules are outside this Edition's scope. They are discussed in *Astor's Law of Lloyd's*, 2nd Ed.

²²⁹ Cf. IPRU(INS), Chapter 4 ('Valuation of assets').

²³⁰ LLD, §13.2.1R.

²³¹ LLD, §13.2.2R. *Per* FSA Glossary, "admissible asset": 'an asset that may be taken into account for the purposes of the solvency requirements in LLD 11.2.1R in accordance with LLD, §13.4.1R.' "Admissible assets" include FAL and exclude OPW: *ibid.*, §13.2.3R.

²³² Cf. IPRU(INS), Chapter 5 ('Determination of liabilities').

²³³ LLD, §12.1.3G, which also refers to *ibid.*, §9.1.4G.

²³⁴ Particularly at LLD, §12.2.5G.

²³⁵ See for example LLD, §12.2.3G(1) ('the member's share of the insurance business liabilities which fall to be identified and valued for each syndicate year'), infelicitously: (1) 'share' is misconceived. A SYA participant is incapable of having a share of his own insurance liabilities, and statutorily prohibited (see Lloyd's Act 1982, s.8(1)) from having a share of anyone else's; (2) "syndicate year": *per* FSA Glossary, "syndicate year" means 'a year of account of a "syndicate"', but *ibid.* does not define 'year of account', so this apparent FSA invention, which has no analogue at Lloyd's, is without obvious meaning. If the FSA intends to mean a year of account — see for example LLD, §12.2.2G ('Members are organised into syndicate years') — there appears to be no reason why it should not use the correct term 'year of account'.

²³⁶ See for example LLD, §12.2.3G(2) ('any liabilities of a member, not covered by (1), arising from the insurance business that he carries on at Lloyd's'), unless some (self-regulatorily prohibited) extra-SYA insurance liabilities are meant.

²³⁷ See for example LLD, §12.2.3G(3) ('any liabilities of the Society, other than liabilities that are subordinated to the interests of policyholders'). The provision is utterly incoherent.

²³⁸ LLD, §12.2.1R:-

(2) rules concerning the calculation of the liabilities of a participant on an open SYA,²³⁹ and particularly general insurance business technical provisions²⁴⁰ and long-term liabilities.²⁴¹ LLD, §12.3.1R is particularly infelicitous terminologically.

equalisation reserve for credit insurance liabilities

- 1.27 The FSA adopts a flexible approach to allocating the equalisation reserve for particular SYA participants' "credit insurance business" liabilities, in relation to which the Corporation is required to determine the equalisation reserve that would apply if all "members" taken together (the FSA probably means all SYA participants taken together) constituted a single insurer subject to IPRU(INS).²⁴² The FSA indicates that the Corporation has the option either of allocating that reserve between "members"²⁴³ (who have no SYA-level liability; nor is there any reason why they should assume it in relation to credit insurance) and 'open "syndicate years"'²⁴⁴ (only SYA stamps selling credit insurance have relevant liability), or to treat that reserve as its own personal liability.²⁴⁵

EquitasRe-reinsured liabilities

- 1.28 FSA rules presently wholly exclude²⁴⁶ from account, for purposes of LLD, Ch. 12 ('Determination of liabilities'), all EquitasRe-reinsured liabilities, to which extent the Lloyd's enterprise gains, in effect, 100% credit for EquitasRe-reinsured SYA participants' RRC 4, §3 outward reinsurance notwithstanding (even if all else were unobjectionable, which it is not²⁴⁷) the latter's insistent assertions to EquitasRe-

The Society must: (1) identify and attribute a value to its liabilities; and (2) take all reasonable steps to ensure that the liabilities of its members arising out of the insurance business which they carry on at Lloyd's are identified and attributed a value....

²³⁹ See generally LLD, §12.3 ('Members' liabilities'). See generally *ibid.*, open SYA stamps' accounts, §12.3.1. For open "syndicate years", a SYA participant's liabilities are the aggregate of: (1) his 'proportionate share' (a misconceived FSA and general concept) of the 'liabilities of each open "syndicate year" in which he participates' (error: a SYA has no liabilities), including: (a) liabilities associated with earlier "syndicate years" that have been closed into that 'year' (note inconsistent use of technical terms); and (b) any equalisation reserve allocated to him under LLD, §12.2.5G; and (2) for open "syndicate years" through which he carries on general insurance business taken together, if A+B exceeds C, A+B-C, where: (a) A is the total of his proportionate shares for each "syndicate year" of the accumulated excess of income over outgoings; (b) B is the amount of any unpaid additional contributions he is required to make to the funds maintained for the "syndicate years" by 'the managing agents'; and (c) C is the total of his 'proportionate shares' (a contradictory concept) of the liabilities net of reinsurance recoveries.

²⁴⁰ See generally LLD, §12.4 ('General insurance business technical provisions'). Note the conceptually and terminologically infelicitous guidance at *ibid.*, §12.4.1G ('Each member is liable for his share of the liabilities of each syndicate year in which he participates'): a SYA participant has no share in his own or in any other SYA participant's insurance liabilities (see Lloyd's Act 1982, s.8(1)); "syndicate year" is an attempt, which does not work when read with "syndicate", to describe a SYA.

²⁴¹ See generally LLD, §12.5 ('Long-term liabilities').

²⁴² LLD, §12.2.4R.

²⁴³ *Per* FSA Glossary, "member" (so far as presently relevant): 'a "person" admitted to membership of the "Society" or any "person" by law entitled or bound to administer his affairs'. *Cf.* the conceptually apparently entirely different "syndicate" *viz.* (per *ibid.*): one or more "persons", to whom a particular syndicate number has been assigned by or under the authority of the "Council", "carrying out" or "effecting contracts of insurance" written at Lloyd's.'

²⁴⁴ See LLD, §12.2.5G(1). The FSA term "syndicate year" appears to be an attempt to finesse, obscurely, the FSA term "syndicate". It merely serves to emphasise the latter's defectiveness.

²⁴⁵ LLD, §12.2.5G(2).

²⁴⁶ At LLD, §12.3.3R: 'For the purposes of this chapter the following liabilities may be left out of account:... (4) liabilities for 1992 and prior general insurance business reinsured by Equitas Reinsurance Ltd.'

²⁴⁷ See ¶¶P11-12.

assureds-at-Lloyd's, in settlement discussions, on its own imminent insolvency, the continuing unquantifiable nature of its liabilities as noted²⁴⁸ in Equitas Holdings Ltd.'s qualified consolidated accounts, and the tenuousness of its discount.²⁴⁹ Other liabilities excluded from account for purposes of LLD, Ch. 12 are: (a) a Member's liabilities for guarantees or letters of credit issued to support his insurance business 'where the guarantor or issuer has no recourse to premium trust funds or funds at Lloyd's';²⁵⁰ (b) liabilities which have been 'covered by a reinsurance to close with reinsurers who were members when the reinsurance to close was effected';²⁵¹ (c) a Member's liabilities arising other than in connection with Membership or his insurance business which 'cannot be met'²⁵² from his funds at Lloyd's 'until funds are released to him'.²⁵³

valuation

- 1.29** Valuation of relevant liabilities is addressed at LLD, Chapter 12 ('Determination of liabilities').

SUP App. 2 Scheme of operations

orientation

- 1.30** SUP App. 2 sets out a "scheme of operations" in the event of the financial difficulty of the Corporation,²⁵⁴ by which the FSA means relevant components of the Lloyd's enterprise, whether the latter wishes to continue business as usual or to go into run-off.²⁵⁵

aspiration to continue to do business / in any event

- 1.31** If the Lloyd's enterprise's "margin of solvency" falls below its "required margin of solvency", it must²⁵⁶ within 28 days of it first becoming aware of that event submit to the FSA a 'plan for the restoration of a sound financial position',²⁵⁷ comprising a "scheme of operations"²⁵⁸ and an 'explanation' of how and by when,²⁵⁹ if ever, the

²⁴⁸ See for example Equitas Holdings RAs fye March 31, 1999-2003.

²⁴⁹ These matters are treated in *Astor's Equitas Re Handbook*.

²⁵⁰ LLD, §12.3.3.R(1). On permitted outgoings from relevant FAL and from PTF-premium, see each fund's governing instrument.

²⁵¹ LLD, §12.3.3.R(2). '[C]overed' is meaningless; 'a' presumably seeks to allude to different, unspecified, types of RTC; 'reinsurers': conventional RTC is not (and is incapable of being) reinsurance.

²⁵² Infelicitous drafting for 'ineligible to be met'. On permitted outgoings from FAL funds, see each FAL fund's governing instrument.

²⁵³ LLD, §12.3.3.R(3). '[U]ntil funds are released to him' is otiose (the phrase 'cannot be met from his funds at Lloyd's until those funds are released to him' is tautologous). In its favour, the sub-paragraph does appear to be one of many FSA iterations of the distinction between Member-level and SYA-level liabilities. But see infelicitously (for example) *ibid.*, §12.2.3G(2) ("any liabilities of a member, not covered by (1), arising from the insurance business that he carries on at Lloyd's"), unless the reference is to a mythical category of insurance business conducted other than by participation (the subject of *ibid.*, §12.2.3G(1)) in a SYA.

²⁵⁴ SUP, App. 2, §2.1.1G read with relevant FSA Glossary definitions especially "Society" (in the absence of a definition of the term "Society of Lloyd's" as used in *op. cit.*, definition of "authorised person").

²⁵⁵ SUP, App. 2, §2.2.3G.

²⁵⁶ Historically see First Non-Life Directive, §20.2. For a mere power to require a financial recovery plan, see First Life Directive, §24a as added by Life Solvency Directive, §1.4. And see similarly First Non-Life Directive, §20a as added by Non-Life Solvency Directive, §1.7.

²⁵⁷ SUP, App. 2, §2.3.1R.

²⁵⁸ SUP, App. 2, §2.3.1(1)R. On the scheme's contents, see *ibid.*, §2.9R. The scheme should be drafted in cooperation with the FSA: *ibid.*, §2.8.1G.

²⁵⁹ See SUP, App. 2, §2.8.2G.

enterprise's "margin of solvency" will be adequately restored to its "required margin of solvency".²⁶⁰ Similar requirements apply to where the enterprise's "margin of solvency" falls below its "guarantee fund".²⁶¹ The FSA is EU-permitted²⁶² to withdraw the Lloyd's enterprise's authorisation if it has been unable, within the time allowed, to implement its own restoration plan. The FSA is similarly empowered 'in exceptional circumstances' to restrict or prohibit, the enterprise's disposal of its assets.²⁶³ If a 'plan'²⁶⁴ submitted to the FSA does not satisfy the FSA that the enterprise is able to restore its "margin of solvency" or meet its liabilities as they fall due, the FSA has indicated that it possibly would ('may') exercise its power²⁶⁵ to vary or cancel the enterprise's "permission".²⁶⁶

decision to put the Lloyd's enterprise into run-off

- 1.32** If the Lloyd's enterprise chooses to go into run-off in relation to 'the whole'²⁶⁷ of its "insurance business"²⁶⁸ — a decision presumably for Members in Corporation general meeting, because the responsibility and liability to maintain the Central Fund is an incident of Membership — it must within 28 days of that decision submit to the FSA a 'run-off plan' comprising a "scheme of operations"²⁶⁹ and 'an explanation of how, or to what extent, all "liabilities" to "policyholders" ... will be met in full as they fall due'.²⁷⁰

information to the FSA

regulatory returns; reporting

- 1.33** The Corporation — which²⁷¹ is not subject to any of the reporting requirements on registered companies, because it is not one — prepares and publishes publicly available annual audited accounts. It is required²⁷² to prepare and submit to the FSA (among other things²⁷³):-

²⁶⁰ SUP, App. 2, §2.3.1(2)R; see *ibid.*, §2.2.3G.

²⁶¹ See SUP, App. 2, §§2.4R, 2.8.2G.

²⁶² See First Non-Life Directive, §22.1(c); First Life Directive, §26.1(c).

²⁶³ See First Non-Life Directive, §21.2; First Life Directive, §24.1.

²⁶⁴ Presumably a final version of the SUP, App. 2, §2.3.1R 'plan' or *ibid.*, §2.4.1R 'short-term financial plan'.

²⁶⁵ See generally FSMA 2000, s.54. The position is not regulatorily satisfactory since no component of the Lloyd's enterprise appears to be authorised to conduct a Regulated Activities Order, §10 activity in the first place. Presumably the FSA would withdraw SYA participants' *ibid.*, §13 exemption, etc.

²⁶⁶ SUP, App. 2, §2.8.1G. On "permission", see generally FSMA 2000, Part IV.

²⁶⁷ On run-off in relation to classes of business, see SUP, App. 2, §2.5.4G; SUP, §15.3.8G.

²⁶⁸ SUP, App. 2, §2.5.2G.

²⁶⁹ SUP, App. 2, §2.5.1(1)R. On the scheme's contents, see *ibid.*, §2.9R. The scheme should be drafted in co-operation with the FSA: *ibid.*, §2.8.1G.

²⁷⁰ SUP, App. 2, §2.5.1(2)R; see *ibid.*, §2.2.3G.

²⁷¹ Corporation subsidiaries which happen to be registered companies are required to file statutory returns in the ordinary way.

²⁷² See for example First Non-Life Directive, §§19.1 (annual account), 19.2 (supervisory returns); First Life Directive, §§23.1 (annual account), 23.2 (supervisory returns). And see Insurance Accounts Directive (*ibid.*, unnumbered nineteenth and twenty-second recitals presage special provisions for the Lloyd's enterprise), especially §4 and Annex ("Provisions relating to Lloyd's").

²⁷³ The reporting provisions in LLD, Ch. 15 ('Reporting by the Society') are extensive and outside this work's scope: see the discussion at *Astor's Law of Lloyd's*, 2nd Ed. For recent proposed changes to the FSA's reporting regime, see relevant parts of (for example) CP 04/7, §1.18. The relevant CP has not yet been published.

(1) an audited 'annual return'²⁷⁴ (the so-called "Lloyd's Return") plus an annual Statutory Statement of Business (SSOB);²⁷⁵

(2) a written²⁷⁶ quarterly return concerning the Central Fund²⁷⁷ — the FSA making no distinction between any 'old' and 'new' such fund — including 'information'²⁷⁸ on the Central Fund's net market value;²⁷⁹ payments made from the Central Fund in that quarter;²⁸⁰ the types of investment in which the Central Fund is held;²⁸¹ the commencement or cessation of, or any changes in the terms of, any insurance policy taken out to protect the Central Fund;²⁸² and any claim made, or circumstances notified that are likely to lead to a claim, under any insurance policy taken out to protect the Central Fund.²⁸³

some other notification requirements

- 1.34** The Corporation is required to inform the FSA (among other things): (1) 'promptly' if "net central assets" fall below the amount required under LLD, §11.2.1R²⁸⁴ (apparently the FSA does not itself monitor the position independently); (2) 'promptly' if the Corporation 'cannot confirm' that it has maintained the "net central assets" required under *ibid.*, §11.2.1R;²⁸⁵ (3) 'promptly' if "net central assets" are, or are likely to be, inadequate under *ibid.*, §11.2.1R;²⁸⁶ (4) 'forthwith' if the nature or quality of reinsurance relied on to reduce the "member's margin" for "general insurance business" for any "member" or "members" changes significantly during the financial year;²⁸⁷ (5) 'forthwith' if, to the extent that an asset is valued at market value, there has been a significant decrease in that value since the end of the prior financial year.²⁸⁸ The FSA is required to keep itself informed of the way in which the Council²⁸⁹ supervises and regulates the market at Lloyd's;²⁹⁰ and of the way in which 'regulated activities'²⁹¹ are being carried on in that market;²⁹² and keep under

²⁷⁴ See generally LLD, §15.2R etc.; and see incidentally *ibid.*, §§9.3.8G, 11.3.3G.

²⁷⁵ See LLD, Ch. 15 ('Reporting by the Society'); see formerly Lloyd's Solvency Test Regulations, §5 ('Statement of business'); *ibid.*, Sch. 3. See incidentally CP 16, §98; PS 16, §37 *et seq.*

²⁷⁶ LLD, §3.3.4G.

²⁷⁷ See LLD, §3.3.1R *et seq.*

²⁷⁸ LLD, §3.3.2R.

²⁷⁹ LLD, §3.3.2R(1).

²⁸⁰ LLD, §3.3.2R(2).

²⁸¹ LLD, §3.3.2R(3).

²⁸² LLD, §3.3.2R(4).

²⁸³ LLD, §3.3.2R(5). And see *ibid.*, §3.3.3G:-

Because of the significance of the Central Fund in the protection of policyholders, the Society should notify the FSA under LLD 3.3.2R(5) of all matters relevant to any actual or potential claim. These include but are not limited to the facts on which that claim is based, the circumstances under which those facts arose and any relevant response to the claim from any insurer or reinsurer concerned.

²⁸⁴ LLD, §11.2.4(1)R.

²⁸⁵ LLD, §11.2.4(2)R.

²⁸⁶ LLD, §11.2.11R.

²⁸⁷ LLD, §11.2.16.

²⁸⁸ LLD, §11.2.17.

²⁸⁹ See for example Lloyd's Act 1982, ss.3, 6, etc.

²⁹⁰ FSMA 2000, s.314(1)(a).

²⁹¹ See generally FSMA 2000, s.22 and *ibid.*, Part IV; and Regulated Activities Order, especially (so far as relate directly to insurance) *ibid.*, §10; see also *ibid.*, §§56-58.

²⁹² FSMA 2000, s.314(1)(b).

review the desirability of exercising any of its FSMA, Ch. XIX powers,²⁹³ and any of its *ibid.*, s.315 powers.²⁹⁴

SOLVENCY AT EQUITAS RE AND EQUITAS LTD.

introduction

principal object

- 1.35** A detailed discussion of the 'Equitas' construct is outside this work's scope.²⁹⁵ The original 'Equitas' company,²⁹⁶ Equitas Re's principal formal object is to 'enter into and implement reinsurance contracts²⁹⁷ for the purpose of reinsuring underwriting liabilities of syndicates at Lloyd's and companies under contracts of insurance or reinsurance written by such syndicates or companies by any syndicate year of account reinsured to close either directly or indirectly into those syndicates or companies and to enter into any collateral or ancillary arrangements relating thereto.²⁹⁸ Equitas Holdings²⁹⁹ consent is required to (among other³⁰⁰ things) Equitas Re acting other than as a reinsurance company.³⁰¹ Its principal contractual functions are to reinsure further to RRC 4, §3 and³⁰² to act as run-off agent further to *ibid.*, §9. Intended to have "no on-going operational role" after entering into RRC 5,³⁰³ Equitas Re executed RRC 4 and RRC 5 on September 3, 1996.³⁰⁴ Equitas Re's Articles of Association limit the principal of all money borrowed from third parties by Equitas

²⁹³ FSMA 2000, s.314(2)(a).

²⁹⁴ FSMA 2000, s.314(2)(b).

²⁹⁵ See Astor's *Equitas Re Handbook*.

²⁹⁶ Originally called NewCo. Equitas Re etc. are unconnected to (for example) the Canadian corporation using that word (on which see for example *Equitas Investment Corp. v Goodman* (1987) 57 O.R. (2d) 795 (H.C.J.)); Equitas America LLC (a securities broker). The word "equitas" occurs jurisprudentially in phrases such as (for example) *equitas nunquam contravenit leges; etsi nihil facile mutandum est ex sollemnibus, tamen, ubi equitas evidens poscit, subveniendum est; a equitas est correctio legis generaliter latoe qua parti deficit; equitas est quasi equalitas; vigilantibus non dormantibus equitas subvenit; equitas sequitur legem; in fictione juris subsistit equitas; equitas est verborum legis directio efficacius cum muna res solummodo legis cavetur verbis ut omnis alia in aequali genere eisdem caveatur verbis; si aliquid ex sollemnibus deficiat, cum equitas poscit, subveniendum est; etc.*

²⁹⁷ [See principally RRCs 4 (see this Edition, Appendix 1.2) and 19.]

²⁹⁸ December 4, 1995 Memorandum of Association, §3(a) (as re-filed: see Record of Decision of the Sole Member, September 11, 1997). The object's use of "syndicate" and "syndicate year of account" is incoherent.

²⁹⁹ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §2 definition of "Shareholder".

³⁰⁰ See the list at Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §17(a)-(h).

³⁰¹ Equitas Re September 2, 1996 Arts. of Assn. (as amended by May 1, 2001 sole member's written resolution), §17(b).

³⁰² To which extent its Memorandum of Association is deficiently drafted: run-off agency is an entirely different business to reinsurance. On the validity of acts done by a company *ultra* its memorandum of association, see generally Companies Act 1985, s.35.

³⁰³ Equitas Re RA 1996, p.4 (directors' report; principal activities); *SOD*, p.82: 'Equitas Reinsurance will act as a conduit for the collection of instalments under Structured Payment Plans and the payment, if any, of return premiums. It will, however, have no ongoing operational role. This structure has been developed in discussion with the DTI.'

³⁰⁴ Equitas Holdings RA fpe September 4, 1996, p.16 (directors' report for the period ended 4 September 1996); *ibid.*, p.9 (Chief Executive Officer's Review). *Ibid.*: 'Literally overnight the Equitas Group became one of the world's largest reinsurers, with £16bn in total assets and perhaps the most difficult claims portfolio ever assembled by one company in the history of the insurance industry.'

Re and Equitas Limited to a total of £1bn.³⁰⁵ Equitas Re does not in any legal sense displace any EquitasRe-reinsured SYA participant or relevant claims payment securitisation fund, *a fortiori* as a mere run-off agent. Nor does EquitasRe-RTC³⁰⁶ have the extricatory effect of conventional RTC. Every insurance liability incurred at Lloyd's remains payable 100% at Lloyd's.³⁰⁷

some germane obligations

- 1.36** Like the Corporation, Equitas Re is required³⁰⁸ to conduct its affairs with integrity,³⁰⁹ and maintain 'adequate' financial resources.³¹⁰ It also appears³¹¹ to be under various obligations when dealing with EquitasRe-assureds-at-Lloyd's, *viz.*, for example, not to mislead them,³¹² to 'fairly' manage duty-interest conflicts involving EquitasRe-reinsured SYA participants,³¹³ and to take 'reasonable care to ensure the suitability of its advice and discretionary decisions for any "customer" who is entitled to rely upon its judgment.'³¹⁴

solvency: regulatory context

- 1.37** In addition to ordinary English company law to which it (like all other companies of the Equitas group) is subject, Equitas Re³¹⁵ — authorised by the DTI as an insurance company subject to various requirements,³¹⁶ some secret³¹⁷ — is subject to ordinary UK and EU primary³¹⁸ and secondary³¹⁹ insurance legislation — particularly Financial Services and Markets Act 2000, and secondary³²⁰ legislation made and

³⁰⁵ Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §58.2.

³⁰⁶ See the summary at Appendix I.

³⁰⁷ See generally Chapter 4.

³⁰⁸ On the applicability of PRIN to Equitas Re, see FSA Glossary, definitions of "firm" and "authorised person" read with Equitas Re's FSA's authorisation.

³⁰⁹ PRIN, §2.1.1.R, Principle 1 ('Integrity').

³¹⁰ PRIN, §2.1.1.R, Principle 4 ('Financial prudence').

³¹¹ Depending on the scope of the word "client": see FSA Glossary definition of *ibid.*, which appears capable of including, in relation to Equitas Re, an EquitasRe-assured-at-Lloyd's.

³¹² PRIN, §2.1.1.R, Principle 7 ('Communications with clients'): 'A "firm" must pay due regard to the information needs of its "clients", and communicate information to them in a way which is clear, fair and not misleading.'

³¹³ PRIN, §2.1.1.R, Principle 8 (Conflicts of interest): 'A "firm" must manage conflicts of interest fairly, both between itself and its "customers" and between a "customer" and another "client", subject to untangling FSA Glossary definitions of "client" and "customer".'

³¹⁴ PRIN, Principle 9 ('Customers: relationships of trust').

³¹⁵ Equitas Re is more fully treated at *Astor's Equitas Re Handbook*.

³¹⁶ See ¶P14; *Astor's Equitas Re Handbook*.

³¹⁷ See ¶P13(4).

³¹⁸ For example Gaming Act 1845, Marine Insurance Act 1906, Marine Insurance (Gambling Policies) Act 1909.

³¹⁹ For example Money Laundering Regulations 1993, SI 1993/1933 Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245; Companies (Summary Financial Statement) Regulations 1995, SI 1995/2092; Insurance Companies (Accounts and Statements) Regulations 1996, SI 1996/943; Life Assurance and Other Policies (Keeping of Information and Duties of Insurers) Regulations 1997, SI 1997/265; Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; Insurance (Fees) Regulations 2001, SI 2001/812; Insurers (Winding Up Rules) 2001, SI 2001/3635; Money Laundering Regulations 2001, SI 2001/3641, etc. and successor legislation where applicable.

³²⁰ For example Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544; Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order

various FSA "handbooks"³²¹ promulgated thereunder. Equitas Re is regulatorily considered to be a "pure reinsurer", viz., 'an "insurer" whose "insurance business" is factually restricted to effecting or carrying out contracts of "reinsurance"'.³²² IPRU(INS)³²³ is therefore the starting point in considering solvency regulation of Equitas Re and Equitas Ltd. Indeed, the FSA, which assumed the DTI's insurance regulatory function, has indicated that it authorises and regulates Equitas Re like, and no differently to, any other insurance company, to which extent the reader is referred to general works on insurance solvency regulation. There are apparently no publicly available special FSA rules applicable to either company³²⁴ (suggesting that the secret Notices of Requirements relate to insolvency rather than regulatory solvency).

reserves: how originally calculated

active underwriting misconduct; failure to keep proper records

- 1.38 By no later than 1982, the massive insurance liabilities which R&R has sought to palliate were already allegedly³²⁵ unquantifiable. Throughout the 1980s and early 1990s, some managing agencies also apparently sold insurance on behalf of SYA

2001 SI 2001/1177; Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217; Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227; Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335; Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783; Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821; Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256; Financial Services and Markets Act 2000 (Meaning of "Policy" and "Policyholder") Order 2001, SI 2001/2361; Financial Services and Markets Act 2000 (Variation of Threshold Condition) Order 2001, SI 2001/2507; Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/25; Financial Services and Markets Act 2000 (EEA Passport Rights) Regulation 2001, SI 2001/2511; Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587; Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001, SI 2001/2634; Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635; Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636; Financial Services and Markets Act 2000 (Transitional Provisions) (Controllers) Order 2001, SI 2001/2637; Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2001, SI 2001/2638; Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967; Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001, SI 2001/2968; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Civil Remedies, Discipline, Criminal Offences etc) (No 2) Order 2001, SI 2001/3083; Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592; Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Business Transfers) Order 2001, SI 2001/3639; Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645; Financial Services and Markets Act 2000 (Transitional Provisions and Savings) (Information Requirements and Investigations) Order 2001, SI 2001/3646; Financial Services and Markets Act 2000 (Scope of Permission Notices) Order 2001, SI 2001/3771, etc.

³²¹ See Preface, fn. 29.

³²² IPRU(INS), §11.1, definition of "pure reinsurer". Cf. FSA Glossary definition of "pure reinsurer", viz., 'an "insurer" whose "insurance business" is restricted to reinsurance'.

³²³ IPRU(INS), §1.1 read with *ibid.*, §11.1 definition of "insurer" (and see *ibid.*'s use of "insurer" in definition of "pure reinsurer"). *Ibid.*'s definition of "contracts of insurance" does not expressly exclude reinsurance. A general discussion of relevant provisions of IPRU(INS) is outside this work's scope.

³²⁴ FSA source, February 24, 2004.

³²⁵ *Per* (at the latest) the famous March 18, 1982 Neville Russell letter, on which see (for example) *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J); *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

participants without properly evaluating the risks or quantifying an appropriate premium;³²⁶ brokered conventional RTC *ditto*; had contrived that SYA participants should be under-reserved³²⁷ (including by (for example) dissipating reserves as false "profit" and bogus "profit commission"); and failed to keep rudimentary relevant records.³²⁸ Self-regulators at Lloyd's so averred in a recent fraud case.³²⁹ During the same period, aided by members' agencies and supervised by self-regulators-at-Lloyd's, some managing agencies habitually placated and encouraged actual and potential SYA participants to participate in and increase their PIL deployed on contiguous YAs of the same syndicate³³⁰ (thereby fostering the SYA participant's delusion of syndicate membership). Before the R&R reserving project,³³¹ the task of properly reserving for, and managing cashflow to pay, the considerable³³² number of APH claims required "virtual clairvoyance" and a "near reckless courage".³³³ In the course of the Equitas Reserving Project exercise (discussed below), it became

³²⁶ See Reg. Bn. 109/98, November 13, 1998 ("Lloyd's disciplinary proceedings — case no. LDB9712/40 (Cuthbert Heath Underwriting Ltd.): the defendant had failed (among other things) to disclose the "true" liabilities and assets of SYAs 404-1987, 404-1988, 404-1989 and 404-1990. Related misconduct included the absence of appropriate reserves in those SYAs' RTC premiums. This misconduct resulted in a £125,000 fine (of which relevant SYA participants presumably receive nothing), permanent revocation of permission to act as a managing agency, and £90,000 costs.

³²⁷ And see *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618, 624 (Potter J).

³²⁸ See *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265 (Cresswell J).

³²⁹ *Lloyd's v Jaffray*, 1996 No. 2032, Points of Reply and Points of Defence to Counterclaim, §66(c) (p.43):-

Lloyd's — whether through Mr. [Murray] Lawrence, the UAAD or otherwise — had no detailed knowledge of the nature of the business written by any particular syndicate, the extent to which it was exposed to asbestos-related claims and what type of claims, what advice had been received from attorneys and actuaries in relation to any such exposure and the nature of the reinsurance protection available to that syndicate. These matters were known to and were the responsibility of the managing agents and the active underwriters of the syndicates concerned, who in conjunction with the syndicate auditors ... were best placed to determine whether any syndicate year should close and, if so, at what RITC premium.

And see *ibid.*, §67(b) (p.44): "It is admitted, and so far as may be necessary averred, that Lloyd's did not undertake any investigation or monitoring of the individual or collective results of the syndicates which may have been exposed to asbestos-related claims." Self-regulators-at-Lloyd's appear to have contended that such self-imposed ignorance was compatible with proper self-regulation: see for example *ibid.*, §43 (p.30):-

(c) It is denied that Lloyd's failed to regulate properly or at all the manner in which syndicates exposed to asbestos-related claims or their auditors reserved for and accounted for such liabilities. ... (d) It is denied that Lloyd's had failed properly or strictly to regulate the activities of agents operating in the Lloyd's market.

At trial, the fraud allegations were unsuccessful: *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J). The appeal was dismissed: *Lloyd's v Jaffray* {2b} [2002] EWCA Civ. 1101.

³³⁰ See the allegations at, for example, *In the Matter of the Offering of Securities by Lloyd's [etc.]*, Docket No. S-3073-I, Arizona Corporation Commission, Notice of Opportunity for Hearing [etc.], §47 (Members should not be exposed); §48 (no exposure at all, or exposure properly outwardly reinsured); evidence in various pre-R&R SYA participants' litigation against members' and managing agencies was to the same effect. And see *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513 (CA); *Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513 (Gatehouse J). Syndicate 134-1988 is a notorious example.

³³¹ See for example *Equitas NLs 1-5*.

³³² Asbestos Working Party lawyers reported in January 1983 suits at the rate of 500 per month: *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 337 (Cresswell J). *Ibid.*:-

As at February, 1983 ... minutes of a panel auditors meeting recorded the following. In June, 1982 the US Labor Department gave the following statistics: 21 million workers have been significantly exposed to asbestos in the last 40 years. 8200-9700 deaths from cancer attributed to asbestosis per annum for the next 20 years. 3000 products in daily use contain asbestos. US\$38 billion total claims for deaths expected. At present there are 25,000 plus claims on the data base for direct asbestosis claims.

³³³ Evidence of Asbestos Working Party chairman to US Senate Labor and Human Relations Committee's sub-committee on Labor, March 1985 quoted in *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney* {2} [1997] LRLR 265, 351 (Cresswell J).

apparent that, apparently contrary to representations³³⁴ to actual and potential Members and SYA participants and notwithstanding the acknowledged³³⁵ and obvious³³⁶ need to do so, self-regulators-at-Lloyd's (responsible for maintaining sufficient CU funds to pay all relevant liabilities) had apparently not required consistency of records,³³⁷ including in relation to outward reinsurance,³³⁸ and had not³³⁹

³³⁴ See for example Corporation RA 1969-1970 ("The object is as it has always been, to provide vital information on which the Market can base reliable judgments as situations develop"); Statement by Peter Green, Chairman, p.2, General Meeting of Members of Lloyd's, Wednesday 4th November 1981 ("The development of computer based systems to handle information about Members, their underwriting allocations, their deposits and reserves is therefore being progressed as quickly as possible"); Address by Mr. Peter Green, Chairman, p.5, General Meeting of Members of Lloyd's, Wednesday 19th November 1980 ("The management services group, which among other things operates the Corporation's computers at Chatham, has made considerable progress in developing both the redesigned central accounting system and the membership system"); Statement by Peter Green, Chairman, p.3, General Meeting of Members of Lloyd's, Wednesday 17th June 1981 ("new Systems and Communications Policy Board which is designed to oversee the use of information handling technologies ... the aim being compatibility of all forms of computing and other electronic equipment"; "re-design of the Central Accounting system has continued smoothly ... [B]ehind the scenes a very large data base has been built up... Lloyd's has always been concerned with technological innovation"); Statement by Mr. Peter Green, Chairman, p.1, General Meeting of Members of Lloyd's, Wednesday 4th November 1981 ("Your Committee believes that it is necessary for Lloyd's to reinforce its efforts to enhance the systems serving the Market and to plan for the use of the new information handling and communications technologies"); Statement by Sir Peter Green, Chairman, p.1-2, General Meeting of Members of Lloyd's, Wednesday 23rd June 1982 ("Systems and Communications Policy Board" ... "our major computer suppliers and advisers" ... "our contribution to Information Technology Year" ... "I am happy to report that development work on the redesign of the Central Accounting System"); Statement by Sir Peter Green, Chairman, p.3, Extraordinary General Meeting of Members of Lloyd's, Wednesday 17th November 1982 ("Systems and Communications Policy Board has continued to investigate the possible future uses of information technology at Lloyd's and has completed a number of important studies. As a result it is likely to be able, by the end of this year, to make important strategic recommendations to the Committee"); Statement by Sir Peter Green, Chairman, p.4, General Meeting of Members of Lloyd's, Wednesday 22nd June 1983 ("The Committee and the Council have been reviewing the work of the Systems and Communications Policy Board in planning for the future use of information technology at Lloyd's" ... "rapid adoption of this technology" ... "The Council recognises the need for it to take a lead in the development of a strategy for the use of information technology and has endorsed the proposals of the Systems and Communications Policy Board for further studies in 1983. Perhaps the most important of these studies is concerned with the methods of processing the insurance business transacted in the Market" ... "the best technical basis"); Statement by Mr. Peter Miller, Chairman, p.5, General Meeting of Members, Wednesday 24 June 1987 ("the establishment of [the London Insurance Market Network] is the first successful attempt to harness modern information technology to the needs of the whole London insurance market including Lloyd's. It will improve the flow of information between underwriters and brokers; it will allow better control of risk by timely settlement of premiums and claims. ... Clearly we can now look forward to an extension of the use of information technology in relation to many other of the Corporation's activities"); *One Lime Street*, January 1994, p.20 ("Information is the backbone of the Lloyd's market. Without the factual and statistical analysis of events, good underwriting decisions cannot be made. Although some information, especially marine, has traditionally been available from Lloyd's of London Press Ltd through Lloyd's List, specialised publications and the intelligence newswire, it was less than a decade ago that a centralised source of statistical and business information was set up as the planning department of the Corporation").

³³⁵ See for example General Meeting of Members, Wednesday 29 June 1988, Statement by Mr. Murray Lawrence, Chairman, p.2: "Present market conditions, uncomfortable though they may be, are overshadowed by the need to provide for the development of past year claims, some as yet unnotified and unquantified, springing mainly from long tail liability business in the United States."

³³⁶ See historically for example *Cromer WP*, p.40:-

[W]e consider that the information collected in the [Lloyd's Policy] Signing Office and the facilities for analysis afforded by the computer offer opportunities that should not be neglected. ... Risk can be broken down into categories in which recent experience may afford a useful guide to future practice. There is of course a wealth of literature on this subject in the various professional journals and a wealth of experience among business consultants who can be brought in to advise. There is a narrower field where the Signing Office could help — namely general information about the history of certain risks.

³³⁷ Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 63: "Now, for the most frequently asked question ... "How many claims do you face?", to which the honest answer is that we don't know since ninety different businesses [managing agencies] counted different things in different

sought, collected, or retained timely or other reliable, complete data³⁴⁰ of SYA participants' exposure to either APH³⁴¹ or non-APH³⁴² liabilities (Nor perhaps had SYA participants' auditors³⁴³). Self-regulators-at-Lloyd's were excoriated by a House of Commons investigation accordingly.³⁴⁴

the Equitas Reserving Project generally

- 1.39 In the Equitas Reserving Project,³⁴⁵ £130m³⁴⁶ of Corporation money appears to have been spent attempting to ascertain the extent of SYA participants'. and

ways and the figures could not be added together." And see Equitas Holdings RA fye March 31, 1998, p.11 (Chief Executive Officer's review):-

The data in the group's possession was obtained from a variety of sources, including approximately 90 independent syndicate managers, Lloyd's bureaux and the Lloyd's Reserving Project It was inevitable that significant variations existed in the quality and consistency of this data.

It was inevitable only because self-regulators-at-Lloyd's had not previously required consistency.

- 338 Scott Moser, *Equitas Claims*, in *Insurance Institute of London Journal* 1998, p.62, 65 ("Our reinsurances and retrocessions are so complex that we quite literally cannot tell how any particular solution will ultimately impact Equitas").

- 339 See for example *Walker CR*, §1.13 (p.8):-

[W]e have ... had considerable recourse to data held centrally at Lloyd's. But some of this material was insufficient for our purposes: for example, Lloyd's does not hold data in readily retrievable form on the historic performance of syndicates and Lloyd's Policy Signing Office ... does not retain data in a form apt for analyses of business undertaken in the market such as LMX spiral transactions. ... [W]e propose that Lloyd's centrally should, in future, be more attentive to the collection, quality and accessibility of data for the purposes of analysis such as that carried out by the [Walker CR] committee

And see *One Lime Street*, January 1994, p.7:-

[T]here had previously been no attempt to establish sound data on old year liabilities, but this task was now being undertaken by three teams of independent actuaries which were analysing likely claims and the known reserves for the pre-1986 underwriting years. There could be no accurate estimate of the old years liability until this research is completed in the late summer.

- 340 But the Corporation had had extensive computer systems for some time. See for example the Corporation's Membership Department's Manager's December 10, 1979 letter, first unnumbered page ("During the last two years, a complete review of Membership Department activities has taken place and development of a new computer system covering all functions of the Department has started"). And see the Corporation's Membership Department's Manager's August 12, 1980 letter and the Corporation's Membership Group's Group Manager's August 15, 1980 letter to Market practitioners on the same subject.

- 341 See also *One Lime Street*, January 1994, p.7:-

[T]here had previously been no attempt to establish sound data on old year liabilities, but this task was now being undertaken by three teams of independent actuaries which were analysing likely claims and the known reserves for the pre-1986 underwriting years. There could be no accurate estimate of the old years liability until this research is completed in the late summer.

- 342 See for example Equitas Holdings RA fpe March 31, 1997, p.24 (Report of the auditors):-

6. Syndicate historical data, much of which was inherited by the Equitas Group from the Reserving Project, ... is not complete and accurate in all respects and has not been subject to an independent audit. 7. As a consequence, the evidence we considered necessary for our audit is not wholly available in respect of the following: (a) the provision for claims outstanding in respect of non-APH liabilities; (b) reinsurers' share of claims outstanding; and (c) exposure to individual reinsurers and consequently the appropriate of bad debt provisions.

- 343 Recalling *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow and Ernst & Young* [1997] LRLR 678, 758 (Colman J; "Accountants involved in Lloyd's audit work, such as Littlejohn Frazer and E&Y, would be aware in general and outline terms of actuarial reserving techniques, for the question of the level of a syndicate's reserve would be material to their audit work").

- 344 See *Treasury Sel. Comm. I, passim*. And see the allegations in *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J).

- 345 See the summary at *SOD*, p.67 *et seq.*; *Price and Price v Lloyd's* [2000] Lloyd's Rep IR 453, 457-458 (Colman J). And see contemporaneously for example Market Bulletin Y213, April 12, 1996 ("Equitas: syndicate premium estimates"); Market Bulletin Y178, March 18, 1996 ("Finalisation of Equitas reserve estimates"); Market Bulletin Y130, January 29, 1996 ("Equitas syndicate consultation process").

- 346 Corporation RA fye December 31, 1996, p.34 (Notes to the financial statements, note 10): 1993: £0.607m; 1994: £10.096m; 1995: £51.106m; 1996: £68.191m.

(through the Central Fund) Members' exposure to those liabilities. In that exercise, self-regulators-at-Lloyd's averred two principal objectives: to ensure that Equitas Re's reserves were based on a "best estimate" of its future obligations, recognising that "finality" was provided through Equitas Re's long-term viability, and to ensure that the premium was payable as between different EquitasRe-reinsured SYA participants on a consistent basis, by applying common reserving approaches across all "syndicates".³⁴⁷ The exercise produced a "best estimate" of insurance liabilities as at 31 December 1995 on an undiscounted basis "neither conservative nor optimistic",³⁴⁸ aiming to arrive at an "affordable"³⁴⁹ (thus accurate principally by coincidence) EquitasRe-reinsurance premium for each putative EquitasRe-reinsured SYA participant (in due course evidenced for each such Member by a so-called "Lloyd's Statement of Reinsurance"³⁵⁰) as at 31 December 1995, taking into account syndicate assets, PSL, and Equitas Re's future operating costs.³⁵¹

particular methodology

- 1.40 The R&R reserving exercise particularly involved the introduction of standardised reserving methodology,³⁵² apparently achieved by (for example): (1) setting up a Market committee called the Reserve Group to review the reserving exercise and provide Market input;³⁵³ (2) ascertaining relevant YAs (principally 1985 and prior);³⁵⁴ (3) collecting relevant data;³⁵⁵ (4) assessing the likelihood of outward re-

³⁴⁷ *SOD*, p.67.

³⁴⁸ *SOD*, p.6.

³⁴⁹ See for example *SOD*, p.67: "In approving the Equitas premium, the Council was required to balance the assessment of the liabilities, the nature of the risks being transferred and the viability of Equitas against the need to have regard to what is affordable by Names and the adverse consequences (to Names and policyholders) that would follow from a failure of the Reconstruction and Renewal plan." The risk of the reserve being insufficient falls principally on the Lloyd's enterprise: see Chapter 3. And see for example *S&M*, p.15:-

44. In determining the premiums at which all 1992 and prior liabilities are to be reinsured into Equitas, a very difficult balance has to be achieved. If the required premiums, are too high, Names will not be able to afford them and R&R will fail. If they are too low, the long term viability of Equitas will be in doubt, thus precluding its authorisation by the DTI. 45. With the help of the Names Committee chaired by Sir Adam Ridley, Lloyd's has tried to allocate the "settlement fund" of £2.8 billion between Names in such a way as to make the Equitas premiums "affordable" by individual Names. ... 46. It follows, in our view, that the final figures, whenever made available, will be capable of being criticised. There will, in any event, be a considerable degree of inherent uncertainty in them

³⁵⁰ Dated and or sent out on or around December 27, 1997.

³⁵¹ *SOD*, p.67.

³⁵² P. K. Demmerle (an attorney at LeBoeuf, Lamb, Greene & MacRae LLP), *An Overview of Lloyd's Plan in Journal of Reinsurance*, vol. 3, no. 1, Fall 1995, p.72, 74 ("The Equitas project has caused: standardized reporting across the entire Lloyd's market; the construction and evaluation of the market's ceded reinsurance portfolio; and liabilities to be evaluated on an exposure-based methodology").

³⁵³ *SOD*, p.68, 70. *Ibid.*:-

It was recognised that the reserving project could only be satisfactorily concluded following substantial consultation with the market. The prime purpose of this consultation was to check the quality and accuracy of existing data and the calculations based on that data. This also proved invaluable in identifying additional data. Agents have been involved in testing the assumptions made by the reserving project and its external professional advisers. The consultation process started in November 1995 and finished in May 1996 and has been a critical part of the reserving project.

³⁵⁴ *SOD*, p.68. And see generally *ibid.*, p.70-77. *Ibid.*, p.68-9:-

Following the general change to the 'claims made' wording, the exposure to long-tail US APH liabilities originally allocated to the 1986 to 1992 years of account is not as significant as that originally allocated to the 1985 and prior years of account.

³⁵⁵ *SOD*, p.69-70. *Ibid.*, p.69:-

From the outset, it was recognised that a key component of the reserving exercise was to collect data based on which a comprehensive reserving analysis could be carried out. Data was collected from a wide range

insurance recoveries;³⁵⁶ (5) taking into account various subsidiary elements such as PSL,³⁵⁷ and the entire cost of Equitas Re running off 1992 and prior liabilities;³⁵⁸ (6) uniform centralised actuarial input;³⁵⁹ (7) marshalling available SYA assets: assets held in relevant PTFs in relation to 1992 and prior business were valued as at December 31, 1995 at £9.9bn (excluding Members' relevant debt and including cash, investments and reinsurance accruals) based on standard-form returns filed by managing agencies;³⁶⁰ (8) discounting of assets (regulatorily permitted³⁶¹), initially at 6%, to take into account Equitas Re's investment return over an estimated run-off

of sources and was processed by the reserving project with support from Ernst & Young. The main sources of data included: the syndicates themselves, who provided extensive data through responses to specific questionnaires and by completing syndicate returns; and information held centrally by Lloyd's and various claims offices including the Specialist Claims Unit, London Market Claims Services, Lloyd's Claims Office and Lloyd's Policy Signing Office.

³⁵⁶ *SOD*, p.77. Outward reinsurance details were collated onto a central database. The reserving project took into account reinsurer failure (as to which appropriate bad debt provisions, using credit ratings, were made, and reinsurance disputes, the "more material" of which were assessed by a legal panel that included retired appellate court judges, plus senior insurance practitioners drawn from in and outside the Market: *SOD*, p.77.

³⁵⁷ See generally for example *SOD*, pp.3, 77, 105-110. The reserving project and R&R finality statements took into account around 150,000 PSL policies for 1992 and prior YAs that some 24,000 Members had bought from (among others) other Members (who had provided 90% of the cover), who in turn had reinsured with other Members: see generally *SOD*, p.77, 105. Not surprisingly, "[a]n extensive [computer] model had to be created. This was a complex process involving a substantial amount of data and millions of individual calculations, which could only be completed once Names' other liabilities had been established. Similar treatment has been given to those syndicates that wrote EPP policies": *ibid.*, p.77.

³⁵⁸ *SOD*, p.78. *Ibid.*:-

The total operating costs of running off the 1992 and prior liabilities have been estimated by Equitas to be approximately £1.2 billion discounted on the same basis as the liabilities. This sum has been included in the Equitas premium. These costs cover all Equitas' costs including fees of its sub-contractors and advisers for claims handling, run-off management, asset management and administration from the start of its operations until all claims have been paid. It is estimated that it will take around 40 years to run off these liabilities.

The one-off provision included "Equitas" central management costs, certain start-up costs, and the costs of "integration and centralisation": *ibid.* "Costs were allocated to syndicates broadly on the basis of their current cost base and their estimated claims payment profile. The Council believes that the Equitas costs represent a significant saving over the cost of running off the 1992 and prior liabilities under the current market structure": *ibid.*

³⁵⁹ See for example *SOD*, p.79:-

The reserving exercise was comprehensive and it was not considered practical for there to be an independent review of the detailed judgements and calculations or an independent audit of the data. It was, however, considered appropriate to retain Tillinghast, inter alia, to analyse whether the processes used by the reserving project were reasonable in relation to Lloyd's intent of producing a 'best estimate' of insurance liabilities on an undiscounted basis.

³⁶⁰ *SOD*, p.79. Financial reinsurances were considered positive assets rather than a reduction in liabilities; the valuation methodology was consistent with that used to value relevant insurance liabilities and reinsurance recoveries, and managing agencies had to segregate relevant net assets for each EquitasRe-reinsured YA, and a process was established to monitor credit and debit transactions from December 31, 1995: *ibid.*, p.79-80. *Ibid.*, p.80:-

The Equitas premium which will be received by Equitas Reinsurance to reinsure the 1992 and prior business will be the value of the assets held in the segregated accounts referred to above on the date the Equitas premium is paid and the amount of the Equitas additional premium which has been charged to Names as part of their finality bills.

³⁶¹ See for example *SOD*, p.143:-

[T]he DTI has permitted Equitas to discount the 1992 and prior liabilities to take into account the return which Equitas believes it can earn on its invested assets. This is not customarily the practice in the Lloyd's market or in the US. There can be no certainty that Equitas will be able to achieve an investment return sufficient to justify a 6 per cent. discount. Equitas may also be required to meet the 1992 and prior liabilities at a faster rate than that assumed in setting the Equitas premium, reducing its ability to earn the assumed investment return on its reserves.

period of forty years.³⁶² Equitas Re continues to discount its assets³⁶³ but appears to apply no countervailing premium to growth in, or other adverse uncertainties relating to, relevant liabilities; (9) "reserve strengthening"³⁶⁴ by: (a) approximately £880m, achieved by discounting some liabilities at 6% and others by an average of only 4.3%;³⁶⁵ (b) around £900m by way of an IBNR provision allocated to all relevant SYAs in proportion to their net underwriting liabilities (excluding PSL, EPP and relevant agreed e&o contributions).³⁶⁶ The exercise also featured, apparently,

³⁶² SOD, p.79. "Equitas believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium": SOD, p.82. *Ibid.*:-

The DTI, as a condition of authorisation, requires an insurance company to show an appropriate surplus of assets over liabilities explicitly on its balance sheet. The premium to be charged by Equitas Reinsurance to syndicates is discounted to reflect the expected timing of claims payments. ... The adoption of this higher discount rate will generate a surplus in Equitas Reinsurance. ... The surplus will be contributed to Equitas Limited as a non-taxable contribution explicitly to support that company's margin of solvency.

And see *ibid.*, p.141:-

Equitas believes that it is able to justify discounting its liabilities at a rate of 6 per cent. However, in setting the Equitas premium, the 'best estimate' has only been discounted using an average rate of 4.3 per cent. The difference between the liabilities discounted at the two different rates will strengthen the Equitas reserves by around 1880 million. In addition, a general IBNR provision of approximately 1900 million has been added to the 'best estimate', further strengthening the Equitas reserves.

³⁶³ See recently for example Equitas Holdings RA fye March 31, 2002, p.18 (Financial review):-

Since we expect the liabilities to be settled over a long period of time, they have been discounted to acknowledge the time value of money. The return to be earned in the future on the investments that are held to meet these liabilities is anticipated through this process of discounting. The calculation of an appropriate discount rate is based on the concept that the prospective return on what is essentially a duration and currency matched fixed income portfolio, if held to maturity, will be approximately equal to its current yield to maturity. The methodology we adopt includes the following steps: the discounting of all liabilities backed by conventional bonds or financial reinsurances by yields on government fixed interest securities of appropriate currency and duration; the discounting of all liabilities backed by index-linked bonds by the real yield on government index-linked securities of appropriate currency and duration plus the price inflation assumption for that currency that has been used for the projection of our liabilities; the calculation of a uniform flat rate of discount to give the same total result as in the steps above; and the application of an appropriate margin for prudence. The margin for prudence takes account of the fact that the liabilities are not perfectly matched, since the investment benchmarks we set our fund managers do not precisely reflect the liability cash flows and the cash flows themselves cannot be precisely predicted. The discount rate is reviewed each year to ensure that it remains a prudent estimate of the average annual return expected to be achieved for the period for which these assets are likely to be held. For the year under review, we have increased the discount rate to 5.25 per cent per annum from 5 per cent per annum to reflect current market yields and our expected claims payment patterns.

The discount rate as at the Equitas Group's published financials fye March 31, 2001 was 5%: Equitas Group RA fye March 31, 2001, p.54. *Per ibid.*, the run-off period was still estimated at 40 years: "The long tail liabilities are expected to be paid out over a period in excess of forty years with the majority of the remaining liabilities expected to be settled in the next several years". Historically, see for example SOD, p.82 ("Equitas [Ltd.] believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium"). Equitas Re charged discounted EquitasRe-RTC premium (so far as one can tell, a premium is an asset, not a liability): see for example *ibid.*:-

The premium to be charged by Equitas Reinsurance to syndicates is discounted to reflect the expected timing of claims payments. Equitas believes that it will be able to adopt a longer-term investment strategy than a syndicate which operates as an annual venture and will be able to discount liabilities at a higher rate than that used to set the Equitas premium. The adoption of this higher discount rate will generate a surplus in Equitas Reinsurance. As Equitas Reinsurance will be structured as a mutual company for tax purposes, this surplus will not be taxable. The surplus will be contributed to Equitas Limited as a non-taxable contribution explicitly to support that company's margin of solvency.

Discounts are predicated on (for example) the discount time period being accurate; investment return rate matching the discount rate; liabilities not cancelling out the discount; operating costs being as forecast, etc.

³⁶⁴ See generally SOD, p.79.

³⁶⁵ SOD, p.79

³⁶⁶ SOD, p.79.

no independent audit³⁶⁷ (but scrutiny by the Government Actuary³⁶⁸); superficial third party review;³⁶⁹ apparently "thorough" review at Lloyd's;³⁷⁰ fixation of reserves as at a particular date, viz., March 31, 1996;³⁷¹ dependence on data provided by sources within the Lloyd's enterprise;³⁷² and considerable inherent uncertainty,³⁷³ especially re APH.³⁷⁴ Equitas Re has apparently recently undertaken a thorough re-

³⁶⁷ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4. *Per* that letter (at *SOD*, App. 4, that letter, p.2):-

The [Equitas Reserving] Project has based the Provision [viz., "future operating expenses and the best estimate of insurance liabilities on an undiscounted basis to be assumed by Equitas Reinsurance Ltd.": *ibid.*, p.1] on analyses conducted by independent qualified actuaries, other independent professionals, Lloyd's staff and the various Managing Agencies. The Project made use of these analyses and the specific findings, conclusions and results therein. The Council of Lloyd's has advised us that given their views on the comprehensive nature of the reserving exercise, it was impractical for there to be an independent audit of the data or for there to be an independent actuarial review of the detailed judgments and calculations underlying the Provision, both of which would have been a necessary part of any actuarial firm determining for itself whether the Provision was reasonable.

³⁶⁸ See *SOD*, p.80, quoting the then Minister for Trade that "the Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due".

³⁶⁹ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4.

³⁷⁰ See *SOD*, p.80, quoting the then Minister for Trade that "Lloyd's proposals are based on a thorough review of the 1992 and prior liabilities and in particular of their exposure to U asbestos and pollution claims".

³⁷¹ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.2; and see *ibid.*, p.4:-

Certain events have come to our attention that have occurred between 31 March 1996 and the date of this letter which may have a significant positive or adverse affect [sic] on the Provision in total and its allocation to members. These events include the Georgine court decision which may cause a change in the method of resolution of certain asbestos claims in the US. While a complete analysis of the effects of these events is beyond the scope of our engagement, based on information currently available to us we do not believe that our findings would be significantly altered.

³⁷² See for example Lazard Brothers & Co., Ltd.'s July 30, 1996 letter to the Council at *SOD*, App. 4, that letter, first unnumbered page:-

[I]n forming our opinion we have assumed and relied upon the accuracy and completeness of the reports and other information provided to us and all representations made to us by the Council, Equitas or their respective advisers and auditors and we have not undertaken any independent verification of such representations, reports or other information.

See also for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

In conducting our analysis, we have used data and other information supplied to us by various areas within Lloyd's. In many cases, we were specifically informed that neither we nor Lloyd's could place formal reliance on such information, though we have been allowed to use it. The scope of this engagement did not include audit or independent verification of this data and information. Our conclusions depend heavily on the accuracy of this data and information.

³⁷³ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

There is inherent uncertainty in any estimates of claims and claims expense reserves. Future claim experience is likely to deviate, perhaps materially, from the underlying estimate. This is because the ultimate liability for claims will be affected by future external events, such as the likelihood of claimants bringing suit, the size of judicial awards, changes in standards of liability, and the attitudes of claimants towards settlement of their claims.

³⁷⁴ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

It should ... be noted that the portion of the Provision related to asbestos, pollution and health hazard liabilities is subject to greater uncertainty than many other types of unpaid loss liabilities. The Provision does not include specific allowance for material extraordinary changes to the legal, social or economic environment (or to the interpretation of policy language) that might affect the costs, frequency, or future reporting of claims or for potential future claims arising from causes not substantially recognised in the historical data. The additional reserves are intended by Lloyd's to provide for this amongst other contingencies. In the case of US pollution liabilities, there is uncertainty in respect of future legislative and administrative reforms. The Provision is based on an assumption that some reforms will occur; such assumption being material in relation to the additional reserves.

examination of Equitas Re-insured SYA participants' inward reinsurance liabilities.³⁷⁵ Various third party advisers including a merchant bank³⁷⁶ and a firm of actuaries³⁷⁷ opined (under pressure of time³⁷⁸) on the "ambitious and brave"³⁷⁹ Equitas Reserving Project's³⁸⁰ process³⁸¹ and had no objection to it.³⁸² The process' appar-

³⁷⁵ See Equitas Group June 21, 2002 press release (EQ36; "Equitas announces financial results for year ended 31 March 2002"), Commentary on Equitas' financial results for the year ended 31 March 2002, p.1:-

During the year a review of all inwards reinsurance asbestos liabilities was undertaken on a more comprehensive basis than had been done since the Lloyd's Reserving Project. The review concluded that this category of reserves was overstated in terms of ultimate gross losses, but that actual payment of inwards reinsurance claims would be somewhat more rapid than had been previously forecast. The positive impact derived from this analysis was largely offset by policyholder-specific and other specific reserve increases, and the aggregate result of asbestos reserve re-evaluations on a net discounted basis was negligible.

³⁷⁶ See for example Lazard Brothers & Co., Limited's July 30, 1996 letter to the Council at SOD, App. 4. *Per* that letter (at SOD, App. 4, that letter, p.2):-

... The opinion of Lazard Brothers & Co., Limited is for the sole benefit of the Council and may not be used or relied upon by any other person and should not be taken to constitute a recommendation to individual Names to accept the settlement offer. Based upon and subject to the foregoing, it is our opinion, from a financial point of view, that the decision of the Council that the Reconstruction and Renewal plan is in the best interests of the Society is reasonable and has been reached after careful enquiry.

³⁷⁷ SOD, p.6 and see *ibid.*, p.68-9, 71, 73, 79, 141. See also Tillinghast-Towers Perrin's July 25, 1996 letter at *ibid.*, App. 4, which expressed a belief that "the process used by the Project to determine the Provision is reasonable and the methods and assumptions used are appropriate overall in relation to the stated objective of providing a best estimate on an undiscounted basis" (*ibid.*, p.2). The letter cited Tillinghast's reliance on data and other information supplied to it by "various areas within Lloyd's. In many cases, we were specifically informed that neither we nor Lloyd's could place formal reliance on such information, though we have been allowed to use it. The scope of this engagement did not include audit or independent verification of this data and information. Our conclusions depend heavily on the accuracy of this data and information" (*ibid.*, p.3). The letter also cited (*ibid.*):-

inherent uncertainty in any estimates of claims and claims expense reserves. Future claim experience is likely to deviate, perhaps materially, from the underlying estimate. This is because the ultimate liability for claims will be affected by future external events, such as the likelihood of claimants bringing suit, the size of judicial awards, changes in standards of liability, and the attitudes of claimants towards settlement of their claims. It should also be noted that the portion of the Provision related to asbestos, pollution and health hazard liabilities is subject to greater uncertainty than many other types of unpaid loss liabilities.

³⁷⁸ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at SOD, App. 4, that letter, p.4:-

The timetable of the Reconstruction and Renewal plan, including its impact on the consultation process with the market, has acted as a constraint on the depth of various analyses underlying the [Equitas Reserving] Project's determination of the Provision, the value of Insurance Related Assets, and cashflow. This may have increased the uncertainty inherent in the Provision.

³⁷⁹ *Treasury Sel. Comm. 1*, §63.

³⁸⁰ SOD, p.67: "An essential element of the Reconstruction and Renewal plan has been the process by which the reserves required to meet the 1992 and prior liabilities to be reinsured into Equitas [Re] have been estimated, based on which the Equitas [Re] premium payable by Names has been agreed by Lloyd's with the DTI and Equitas." See generally for example SOD, p.67-80; *Equitas NLs*.

³⁸¹ See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at SOD, App. 4:-

[that letter, unnumbered first page] The purposes of this analysis were to determine whether: (i) the process used by the [Equitas Reserving] Project to determine the Provision is reasonable in relation to Lloyd's intent of producing a best estimate of the insurance liabilities and future operating expenses, being neither conservative nor optimistic, and (ii) the process used by the Project to determine the value of the Insurance Related Assets is consistent with the approach used to determine the Provision, and (iii) the process used by the Project to determine the cashflows is consistent with the approach used to determine the Provision, and (iv) the process used by the Project to allocate the Provision, as discounted by the Project, to members of Lloyd's is reasonable in relation to Lloyd's intent to make such allocation on a consistent basis, ie by applying common reserving approaching across all syndicates. [*ibid.*, p.2] We have ... been asked to review, and have only reviewed the process by which the [Equitas Reserving] Project made use of these analyses and the specific findings, conclusions and results therein [*ibid.*, p.3] We believe that the process followed in the allocation of the discounted Provision to the members is reasonable

ently excessive reliance on assumptions has been criticised,³⁸³ and their uncertainty acknowledged in *SOD*³⁸⁴ and in the qualified reports of Equitas Re's auditor in Equitas Group consolidated accounts.³⁸⁵ The EquitasRe-reinsurance premiums eventu-

³⁸² See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3:-

Based on our analysis, we believe that the process used by the [Equitas Reserving] Project to determine the Provision is reasonable and the methods and assumptions used are appropriate overall in relation to the stated objective of providing a best estimate on an undiscounted basis. In addition, we believe that the processes used to determine the value of the Insurance Related Assets and cashflows are consistent with the approach used to determine the Provision.

³⁸³ See for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.11:-

[S]etting the premium for Equitas was the result of an arduous actuarial process involving many iterations, but having the premium level accepted had some elements of negotiation. Moody's believes this process of negotiation, symbolised by the substantial credits provided to Names (essentially, bad debt write-offs), could have weakened Lloyd's ability to set strong provisions at Equitas. Because of the nature of the liabilities ... and the relative illiquidity and weak capitalisation of Equitas, future deviations from the assumptions made during the reserving exercise could have material consequences for its financial strength. For instance, looking at the balance sheet as struck on 4 September 1996, a 10% write-off of debtors or reinsurance receivables, all other things being equal, would wipe out the entire capital base of Equitas.

³⁸⁴ See for example *SOD*, p.142:-

[F]or any insurer the establishment of loss reserves is an inherently uncertain process and claim payments may exceed reserves. In particular, asbestos, pollution and health hazard liabilities are subject to greater uncertainty than many other types of liabilities. The reserving project's estimate of APH liabilities account for approximately 40 per cent. of the estimated liabilities of Equitas on a discounted basis net of reinsurance as at 31 December 1995. As explained in Chapter 1, the actual premium to be received by Equitas Reinsurance will be substantially lower than that assessed as at 31 December 1995 and, accordingly, the proportion of liabilities represented by APH claims is likely to be significantly higher than 40 per cent. when the Settlement Agreement becomes unconditional. In the case of US pollution liabilities, the uncertainty includes uncertainty in respect of future legislative and administrative reforms. The 'best estimate' of liabilities is based on an assumption that some such reforms will occur. This assumption is material in relation to the level of the reserve strengthening referred to above. This assumption is addressed in Chapter 6 and in the letter from Tillinghast set out in Appendix 4.

³⁸⁵ Every set of audited accounts of the Equitas group has been qualified. See recently for example Equitas Holdings RA fye March 31, 2002, p.35 ("Independent Auditor's report to the Members of Equitas Holdings Ltd."; June 18, 2002). *Ibid.*, p.35:-

8. In forming our opinion, we have considered the uncertainties, described in notes 1 and 2 to the financial statements, relating to the provision for claims outstanding of £7.763 million, reinsurers' share of claims outstanding of £1.142 million and reinsurance debtors of £923 million. Future experience may show material adjustments are required to these amounts particularly in respect of: (a) assumptions made in estimating provisions and the reliability of the underlying data upon which estimates are based; (b) the potential for unforeseen change in the legal, judicial, technological or social environment and the potential for new sources or types of claim to emerge; (c) assumptions in relation to expected interest yields and the timing of settlement of claims and reinsurance recoveries which influence the discount calculation; and (d) assumptions in relation to estimating the reinsurers' share of claims outstanding and the extent to which these and amounts due from reinsurers will be collected. 9. The potential adjustments referred to in paragraph 8, if adverse in the aggregate, could be material enough to exceed the amount of shareholders' funds at 31 March 2002 of £679 million.

See similarly recently for example Equitas Group RA fye March 31, 2001, p.40-41 ("Report of the Auditors to the Members of Equitas Holdings Limited"); Equitas Group RA fye March 31, 2000, p.28-29 ("Report of the Auditors to the Members of Equitas Holdings Limited"); Equitas Group RA fye March 31, 1999, p.27-29 ("Report of the Auditors to the Members of Equitas Holdings Limited"), which latter were further qualified (*ibid.*, p.28) in relation to information, explanations and accounting records:-

Limitations — 8. Underlying data, some of which was inherited from the Reserving Project, established by Lloyd's in connection with the Reconstruction and Renewal Plan, is not complete and accurate in all respects. 9. As a consequence, the evidence we considered necessary for our audit is not wholly available in respect of the following: (a) the provision for claims outstanding in respect of non-APH liabilities; (b) reinsurers' share of claims outstanding; and (c) exposure to individual reinsurers and consequently the appropriate level of bad debt provisions. 10. Had we been able to obtain all the evidence necessary to satisfy ourselves in respect of these matters we might have concluded that material increases or decreases are required to the relevant amounts included in the balance sheet. ... — Qualified opinion arising from uncertainties and limitations in our audit — 12. In respect alone of the limitations on our work described in paragraphs 8 and 9 above: (a) we have not obtained all the information and explanations that we considered necessary for the purpose of our audit; and (b) we were therefore unable to determine whether proper accounting records had been maintained. ... PricewaterhouseCoopers ... 20 July 1999.

ally arrived at by the Equitas Reserving Project were not³⁸⁶ necessarily consistent as between all Equitas Re-insured SYA participants.

sufficiency of Equitas Re's reserves

- 1.41 Consideration of Equitas Re's current financial position is outside this work's scope. While self-regulators-at-Lloyd's have acknowledged³⁸⁷ that Equitas Re's relevant reserves were relatively small, the DTI expressed satisfaction³⁸⁸ that its resources

See further for example Equitas Holdings RA fye March 31, 1998, p.4 (Chairman's statement):-

We have continued to experience difficulty with the data Equitas inherited from individual syndicates records and from the Lloyd's Reserving Project. ... [W]e hope that a considerable improvement in the quality of our data will be achieved in the current financial year. Meanwhile, our auditors have again qualified our accounts ... since they have difficulty with the data.

Independent Insurance Co. Ltd.'s recent insolvency has apparently been referred to UK criminal investigation authorities in connection with allegedly unquantifiable liabilities: see for example *Financial Times*, June 19, 2001 ("Independent faces fraud probe": ... Last month, Watson Wyatt, the company's external actuaries, discovered Independent faced unquantifiable losses [as has the Lloyd's enterprise since 1982: see *Lloyd's v Jaffray* {2a} CLC 725 (Cresswell J) ... from claims which had never been entered into its systems"). And see fortuitously *Financial Times*, June 20, 2001 ("Equitas set to fortify reserves").

- 386 See for example Tillinghast-Towers Perrin's July 25, 1996 letter to the Council and to the "Board of Equitas" at *SOD*, App. 4, that letter, p.3: "We believe that the process followed in the allocation of the discounted Provision to the members is reasonable in relation to the stated objective of allocating the Provision, as discounted by the [Equitas Reserving] Project ..., albeit there are likely to be individual situations where such allocation is too high or low, perhaps materially, for a small number of members."

- 387 See for example *SOD*, p.141:-

Equitas Reinsurance and Equitas Limited are DTI authorised reinsurance companies and are subject to the regulatory framework for insurance business in the UK operated by the DTI. In authorising Equitas Reinsurance and Equitas Limited, the Minister for Trade noted that the "Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due". The level of Equitas' additional reserves is, however, small compared to that of ongoing insurance companies authorised in the UK and elsewhere that have written comparable exposures.

- 388 See for example *Hansard*, House of Commons, May 10, 1996, col. 297-298:-

Mr. John Greenway: To ask the President of the Board of Trade, pursuant to his answer to the hon. member for Bournemouth, West (Mr. Butterfill) on 29 March, *Official Report*, columns 762-64, what developments there have been since 29 March concerning Equitas; and if he will make a statement. **Mr. Nelson:** Since I announced the authorisation of Equitas on 29 March 1996, *Official Report*, columns 762-63, further work has taken place on the level of liabilities which Equitas will reinsure and on the assets available to cover them. As a result, the expected opening balance sheet of Equitas will be significantly stronger than originally foreseen, while the increase in provisions for 1992 and prior liabilities required will be about £1.2 billion rather than the £1.5 billion or more previously envisaged. These developments improve the prospects that Equitas will be able to pay off its liabilities in full as they fall due.

And see *ibid.*, March 26, 1996, col. 763-764:-

Mr. Butterfill: To ask the President of the Board of Trade if he has taken a decision under the Insurance Companies Act 1982 on the authorisation of Equitas; and if he will make a statement. [24286] **Mr. Nelson:** I have considered carefully the proposals made by Lloyd's for the authorisation of Equitas Reinsurance Ltd. and Equitas Ltd. ("Equitas"). Lloyd's proposes to reinsure the market's 1992 and prior non-life liabilities into Equitas, and to provide matching assets together with an additional solvency margin of free assets. Equitas would be a pure reinsurer, and Lloyd's application does not seek authorisation for it to undertake any subsequent business. Lloyd's proposals are based on a thorough review of the 1992 and prior liabilities and in particular of exposure to US asbestos and pollution claims. This review has been assisted by work undertaken by a number of leading firms of consulting actuaries and chartered accountants.

I have decided to authorise Equitas on the basis of Lloyd's proposals, subject to certain conditions which Lloyd's does not expect to fulfil before August this year. Of these, the most important are, first, that the contracts reinsuring names' liabilities into Equitas cannot be completed until Lloyd's can demonstrate that the assets available to Equitas are such as to ensure it has the minimum solvency margin I have required. Lloyd's statement of assets available to Equitas will be subject to independent review by Coopers and Lybrand, which is to be appointed as Equitas' auditors once the contracts are completed. Secondly, there are conditions to ensure that if developments between now and August should lead to an increase in the estimate of the overall level of liabilities, then a matching increase in the assets would have to be provided. In addition, there is a condition making any dividend to any shareholders or return premium to reinsured names subject to DTI consent. Any future proposal that Equitas should undertake further business would require DTI consent.

Under section 32 of the Insurance Companies Act 1982, UK insurance companies are required to maintain a minimum margin of free assets, calculated according to a formula. The formula was not devised with circumstances such as the Equitas proposal in mind, and is likely to produce widely fluctuating require-

were adequate to pay all EquitasRe-reinsured liabilities as they fell due. The amount and sufficiency of the EquitasRe-reinsurance premium was (to some extent) a commercial decision principally for Equitas Re.³⁸⁹ For example: (1) neither AUA 9 nor any EquitasRe-reinsured SYA stamp's managing agency³⁹⁰ is liable to Equitas Re for quantifying EquitasRe-reinsured liabilities or for Equitas Re's own decision to assume them;³⁹¹ (2) every EquitasRe-reinsured SYA participant agrees in RRC 4 (AUA 9 so agreeing on his behalf³⁹²) that his relevant managing agency is not liable to him in relation to either the acceptance of RRC 4's terms or the basis on which any EquitasRe-reinsured liabilities were valued (as at RRC 4's inception

ments over the first four years of Equitas' life. I have therefore decided to exercise the discretion to which I am entitled under the Act to make a direction under section 68 to modify the normal requirements in 1996 and 1998.

In reaching this decision, I have been mindful of my responsibilities under the Insurance Companies Act 1982 in relation to the authorisation of new insurance companies and the protection of policyholders in general. In this case, I have to consider whether policyholders would be better protected if Equitas is authorised than if it is not. I must also be satisfied that all the statutory requirements for authorisation under the Act have been met.

The main reasons for my decision are as follows.

First, policyholders will benefit from substantial additional funds which would not otherwise be likely to be forthcoming. The provisions made for 1992 and prior liabilities have been increased by more than £1.5 billion. Equitas will be funded to meet its estimated liabilities and to provide the additional margin of free assets. Some £1 billion plus of the funding is to be provided from sources which have no obligation to support 1992 and prior losses, together with approaching a further £2.5 billion deriving from new money from names, the settlement of the current litigation and from 1993-94-95 profits which would not otherwise be necessarily or immediately available to support these losses. The Equitas proposals will also ensure that the assets to cover these provisions will be fully paid, in contrast to the present position in which some £4 billion of Lloyd's assets is represented by uncalled losses or unpaid cash calls. Furthermore, subject to the division of Equitas' assets between US, Canadian and UK trust funds, the assets of Equitas will be fully mutualised and all available to support all of Equitas' liabilities to policyholders.

Secondly, the creation of Equitas offers a strong prospect of lower claims handling costs and higher investment yields than would otherwise be the case, the benefits of which will accrue to policyholders in the first instance. Overall, I am satisfied that the resources available to support 1992 and prior policyholders through Equitas will be greater and more certain than without its authorisation. The Government Actuary takes the view that there is a reasonable prospect that Equitas will be able to pay off its liabilities in full as they fall due.

Thirdly, if, against expectation, the liabilities of Equitas at some future point should appear to be on the point of exceeding the assets available, arrangements will have been built into the reinsurance contract with names designed to ensure that policyholders would continue to receive an uninterrupted flow of claims payments, albeit at less than 100 per cent., with the residual balance of claims falling back on to the reinsured names. These arrangements would provide a much superior outcome for all policyholders, including reinsured names, than conventional insolvency proceedings for Equitas.

Fourthly, the creation of Equitas as proposed will very significantly improve the security of 1993 and subsequent policyholders at Lloyd's, by substantially removing the risk that further deterioration in the 1992 and prior liabilities would affect them.

Last, if Equitas does not proceed, Lloyd's has acknowledged that there is a significant risk that Lloyd's as a whole would have to cease underwriting. In that event, the subsequent run-off would face an uncertain future. I therefore consider Lloyd's proposals are a well-judged response to this situation in the interests of existing Lloyd's policyholders, and of reinsuring names as policyholders.

It is now for the members of Lloyd's to decide whether to support Lloyd's proposals as the next step before Equitas can go live later this year.

³⁸⁹ See RRC 4, §3.11, heading "Underwriting decision".

³⁹⁰ No relevant managing agency was a party to RRC 4, hence RRC 4 was (partly for that reason) executed as a deed in order to extend the benefit of RRC 4, §3.11 to relevant managing agencies: RRC 4, recital §(H).

³⁹¹ RRC 4, §3.11(a). This is without prejudice to a managing agency's liability for the performance generally of RRC 2, RRC 8 or RRC 9: *ibid*. But see RRC 2, §1.9 (managing agency not liable to Equitas Re for setting the EquitasRe-reinsurance premium).

³⁹² RRC 4, §3.11 ("It is expressly acknowledged and agreed ... (b) by the Substitute Agent on behalf of each Name...").

date);³⁹³ (3) Equitas Re is not liable to him in relation to such valuation.³⁹⁴ The RRC 1 Accepting Name similarly waives his relevant rights against Equitas Re.³⁹⁵ Various post-R&R English litigation on EquitasRe-reinsurance premium defects has all failed.³⁹⁶

³⁹³ RRC 4, §3.11(b). *Cf.* the Accepting Name's comprehensive releases of his relevant managing agency at RRC 1. *Cf.* a managing agency's liability under a form of RRC 2, RRC 8 or RRC 9: *ibid.*

³⁹⁴ RRC 4, §3.11(c).

³⁹⁵ RRC 1, §4.7(a) *et seq.*, and *ibid.*, Sch. 1, definition of "Other Rights".

³⁹⁶ See for example *Price v Lloyd's* [2000] Lloyd's Rep IR 453 (Colman J); *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Lloyd's v Leighs* [1997] CLC 1398 (CA).

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Sub-chapter 1: principles

ORIENTATION

no inherent legal privileges

- 2.1 No component of or participant in the Lloyd's enterprise has any inherent privilege in relation to ordinary relevant English insolvency (or any other) law (*cf.* law expressly tailored to the enterprise's peculiarities). No law requires, permits or invites the Council to promulgate any measure conferring any privilege from such law on any component of or participant in the Lloyd's enterprise in relation to any matter. The notion is unfounded that any EquitasRe-reinsured SYA participant, whether as conduit or *solus*, has, by any occult inherent or implied, or covert express, due process, extricated himself — or been extricated by self-regulators-at-Lloyd's or any legislature, external regulator or court — to any legally binding extent from any pre-1993 non-life liability to any EquitasRe-assured-at-Lloyd's, including by buying reinsurance from Equitas Re or any other source.

Reorganisation Directive

- 2.2 Though the Reorganisation Directive¹ does² apply to the Lloyd's enterprise, the Reorganisation Regulations, which implement the Directive, expressly exclude the Lloyd's enterprise,³ and SYA participants individually⁴ and collectively.⁵ The Treasury having failed timeously⁶ to implement the directive, it now has direct effect in relation to the enterprise.

distinguishing the players

summary

- 2.3 When due-diligencing insolvency at Lloyd's, the assured-at-Lloyd's, mindful of the multiplicity of participants there and the essential distinctions between FO and BO, and between BBSN and not-BBSN circumstances, will distinguish between (for example): (1) the insurer with whom he is in original (*cf.* novated) privity, *viz.*, each SYA participant *originalis*, whose FO collection liability as *solus* will arise only in not-BBSN circumstances (and never, in any event, because of the insolvency, in BBSN circumstances, of a mere outward reinsurer); (2) relevant insurers with whom he may, on analysis, be to some extent in novated privity, such as the most recent generation of conventionally inward-RTCing SYA participant, whose

¹ See Appendix II.

² Reorganisation Directive, §1 read with *ibid.*, §2(a) (definition of 'insurance undertaking') read with First Non-Life Directive, §6, First Life Directive, §6 — subject to the reservation that relevant components of the Lloyd's enterprise appear to be 'officially authorised' (within the definition *cit.*) by being not authorised: SYA participants are exempt from FSMA 2000 authorisation (see Regulated Activities Order, §13), Members are not FSMA 2000, s.19-authorised, and the Corporation appears to be neither FSMA 2000, s.19(1)(b)-exempt nor *ibid.*, 2.19(1)(a)-authorised in relation to any Regulated Activities Order, §10 activity: see ¶1.13 *et seq.*

³ Reorganisation Regulations, §3.

⁴ Reorganisation Regulations, §3 read with FSMA 2000, s.316(1)(a).

⁵ Reorganisation Regulations, §3 read with FSMA 2000, s.316(1)(b).

⁶ See ¶P15.

FO collection liability as *solus* may be as remote as that of the *originalis*;⁷ (3) relevant other components of the Lloyd's enterprise such as (for example) Members and the Corporation (whose personal liability, in BBSN and not-BBSN circumstances, for SYA participants' insurance liabilities is not presently clear); (4) his own servants or agents — not personally liable to him under any insurance contract — such as (for example) the Lloyd's broker (generally the assured's-at-Lloyd's agent whether or not also the agent of a participant on the other side of the insurance transaction⁸); (5) other relevant third-party service providers — not personally liable to him under any insurance contract — such as relevant managing agencies and other insurer-side claims handling agents including run-off agents.

insolvency of service providers

- 2.4** The insolvency of relevant third-party service providers will usually be irrelevant to the assured-at-Lloyd's: (1) substantively: because the service provider assumes no express personal liability on,⁹ and will be seised only exceptionally¹⁰ with other legal liability arising in relation to, an insurance contract made at Lloyd's; (2) administratively, because some substitute will always (in the case of a managing agency, including in relation to claims handling) or sometimes (in the case of a Lloyd's broker, including in relation to broking renewals and claims) be found to assume the insolvent's contractual obligations to (respectively) run off and claim under the insurance contract. These factors may change in not-BBSN circumstances, when the assured-at-Lloyd's will presumably also more closely examine actionable misconduct against him by relevant subsidiary parties such as claims handlers and claims brokers, such as (for example) the latter's failure to fully and timeously disclose to him relevant recourse complexities likely to arise in not-BBSN circumstances.

distinguishing BBSN and not-BBSN circumstances

- 2.5** For the assured-at-Lloyd's, there may be a material difference, in the insolvency context, between BBSN and not-BBSN circumstances, however solvent or insolvent may be the SYA participant *solus*, and it affects the FO, MO and BO alike. In BBSN circumstances: (1) every SYA participant, including the most substantial corporate SYA participant, however insolvent, is irrelevant as a *solus* and is never of the slightest FO concern to any assured-at-Lloyd's, especially including his Lloyd's broker, or of any MO concern in relation to the availability or stability of

⁷ If in not-BBSN circumstances the *originalis* cannot practicably be found, the assured-at-Lloyd's will presumably pursue, if any *solus*, the most recent conventionally inward-RTCing SYA participant, *a fortiori* if a substantial solvent corporate SYA participant. While the latest inward's BO liability for the inward business is well established (see the summary at Appendix I), his FO legal liability direct to the assured-at-Lloyd's does not appear to be the subject of any jurisprudence, though inwards are for all practical purposes the parties to routine coverage litigation. For a full discussion of the contractual dynamics of conventional RTC (outside this work's scope), see *Astor's Law of Lloyd's*, 2nd Ed.

⁸ Multiple agency at Lloyd's is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁹ Such as (for example) the Corporation, members' agencies, managing agencies, Lloyd's brokers, AUAs, etc.

¹⁰ Litigation by an assured-at-Lloyd's against a Lloyd's broker for actionable claims broking is surprisingly rare, notwithstanding generous English (*cf.* for example New York) limitation periods and clear pro-assured law, as in (for example) *Johnston v Leslie & Godwin Financial Services Ltd.* [1995] LRLR 472, 475, 477 (Clarke J), and English courts' apparent liberality in allowing the Lloyd's broker to act actionably in relation to multiple principals: see for example *Anglo African Merchants Ltd. v Bayley* [1969] 1 Lloyd's Rep. 268; *North and South Trust Company v Berkeley* [1971] 1 WLR 471, on which see the gloss at *Callaghan and another (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep. IR 125 (David Steel J). The Lloyd's broker's liability is fully considered at *Astor's Law of Lloyd's*, 2nd Ed.

any CU claims payment securitisation trust fund; (2) there is no FO-relevant insolvency procedure peculiar to any insolvent SYA participant — such as voting or proving in any BO insolvency process to which he may become subject — and no need for one, because financial resources at Lloyd's are by definition always available to remedy a SYA participant's relevant default after, and necessarily before,¹¹ the exhaustion of his FAL and OPW; (3) his insolvency being relevant only to his BO creditors, a Wilson notice (in relation to the SYA participant's insolvent estate) and *Re Yorke* proceedings (seeking to protect a dead SYA participant's executors) do not and need not pierce the FO-MO-BO veils. Were not-BBSN circumstances to descend upon the Lloyd's enterprise, some of these dynamics — in theory if not in practice¹² — are likely to change whether or not the SYA participant personally happens to be solvent. The UK measure implementing the Reorganisation Directive in relation to the Lloyd's enterprise will presumably elucidate the position.

THE CORPORATION

insolvency

principles

- 2.6** Companies Act 1985, s.425 and liquidation in the context of the Corporation's own personal insolvency are discussed elsewhere.¹³ The Corporation, a statutory corporation which chooses to publish its own personal annual audited accounts (fye December 31), does contract, trade, beneficially own assets,¹⁴ incur personal liabilities,¹⁵ and can become insolvent¹⁶ in the ordinary way¹⁷ (*cf.*, for example, a syndicate, which does not and cannot). The Corporation's liability directly to assureds-at-Lloyd's for insurance liabilities incurred by SYA participants is unclear¹⁸ and will not usually need to be ascertained in BBSN circumstances, absent (for example) a direct attack by an assured-at-Lloyd's (perhaps on the lines of *Industrial Guarantee Corporation v Lloyd's*¹⁹) who has lost a coverage argument.

law

- 2.7** It is useful to distinguish between insolvency law applicable to the Corporation generally and applicable to it in its fictional capacity of "insurer":²⁰

¹¹ *Viz.*, for example, the Council's deployment of the Central Fund as PU float.

¹² In practice, rounding up the relevant available assets of a solvent or insolvent SYA participant is likely to be done by some BO collectivisation mechanism to avoid the assured-at-Lloyd's needing to collect against each *solus*.

¹³ See Sub-Chapter 2.

¹⁴ See for instance Lloyd's Act 1911, s.7.

¹⁵ See for example Lloyd's Act 1911, s.7(d).

¹⁶ *SOD* and *S&M* specifically addressed Corporation insolvency.

¹⁷ See incidentally *S&M*, §63 (p.22):-

The obligations of the Council in relation to creditors of the Corporation ... are similar to those of the directors of a limited liability company in relation to its creditors: in short, if [it ceased to be] reasonable to believe that the Corporation will be able to pay its debts as and when they fall due, the Corporation would have to stop trading. That would clearly affect adversely, maybe terminally, the prospect of an on-going Lloyd's market. ... [I]f there is not a reasonable prospect of an on-going Lloyd's market, then there is also not a reasonable prospect of the Corporation being able to continue.

¹⁸ See ¶2.23 *et seq.*

¹⁹ (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J).

²⁰ See FSA Glossary, definition of "Society".

(1) general insolvency law: Insolvency Proceedings Regulation appears²¹ to apply to the Corporation. Insolvency Act 1986, s.221 ('Winding up of unregistered companies') appears to ordinarily not²² apply to the Corporation;

(2) insurance insolvency law: as to EU law, First Non-Life Directive and First Life Directive do not²³ apply to the Corporation, and if that be right, the Corporation is not²⁴ an EU 'insurance undertaking' as defined²⁵ (*cf.* SYA participants collectively, who are). Therefore Reorganisation Directive²⁶ does not apply to the Corporation (*cf.*, supposedly,²⁷ SYA participants collectively). Reorganisation Regulations²⁸ expressly exclude (SYA participants²⁹ and) the Corporation (to which latter, on the foregoing reasoning, it is incapable of applying anyway). The following appear to not apply to the Corporation, this time for UK domestic legal reasons: FSMA 2000, Part XXIV ('Insolvency')³⁰ (similarly not to SYA participants, for different reasons³¹); Insurers Winding Up Rules³² (similarly not to SYA participants³³); Insurers

²¹ *Ibid.*, §2 exclusion of 'insurance undertakings' (not defined in the regulation) appears (subject to the intended definition) to be irrelevant.

²² The FSA appears to have given itself power to apply to wind up the Corporation as an 'insurer' further to that section, but that (like FSA Glossary's definition of the Corporation as an "insurer") may be a drafting error.

²³ Unless, in a further terminological convolvement, the word "Lloyd's" at First Non-Life Directive, §8.1(a), obviously used in error, actually does include the Corporation.

²⁴ *Cf.* the different approach at Insurance Accounts Directive, Annex, §A ("For the purposes of this Directive, both Lloyd's and Lloyd's syndicates shall be deemed to be insurance undertakings"), and the existing First Non-Life and First Non-Life Directives' definitions of 'insurance undertakings' apply in Insurance Accounts Directive (*ibid.*, §2.1, last sentence), thus adding another two layers of 'insurance undertakings' in relation to the Lloyd's enterprise. The approach at Insurance Accounts Directive, Annex is rendered incoherent by (for example): (1) *ibid.*'s failure to define "Lloyd's"; (2) *ibid.*, main part, §4, which is meaningless; (3) the reference in *ibid.*, Annex, to "Corporation of Lloyd's", in view of which, to what does the directive refer by "Lloyd's" *simpliciter*?

²⁵ For definitions of 'insurance undertaking', see First Non-Life Directive, §8(1)(a) (the relevant regulatee is the "association of underwriters known as Lloyd's", not Lloyd's, a demonstration of EU terminological dysfunction); First Life Directive §8(1)(a) (*ditto*).

²⁶ Although the Corporation is a FSA Glossary-defined "insurer", it appears — see the unhelpful public register mentioned at ¶P.13(3) — not to be authorised as one to the extent required by Reorganisation Directive, §2(a), *viz.*, authorised under First Non-Life Directive, §6, and First Life Directive, §6. If somewhere in FSA regulation the Corporation is authorised as an 'insurer' consistently with the FSA Glossary definition, then the Reorganisation Directive does apply to it.

²⁷ Who appear to be treated by the FSA, arguably erroneously, as falling within Reorganisation Directive, §2(a) but who are not actually authorised under either First Non-Life Directive, §6 or First Life Directive, §6 — other than perhaps, by being exempt (under Regulated Activities Order, §13).

²⁸ See Reorganisation Regulations, §3, and excluded in any event by *ibid.*, §2(1), definition of 'UK insurer' (subject to some presently occult permission: see ¶P.13(3)).

²⁹ See Reorganisation Regulations, §3, and excluded in any event by *ibid.*, §2(1) definition of 'UK insurer' read with Regulated Activities Order, §13.

³⁰ See Financial Services and Market Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 (definition of 'insurer') (the Corporation does not conduct any Regulated Activities Order, §10 activity).

³¹ *Viz.*, Financial Services and Market Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a) read with Regulated Activities Order, §13.

³² See Insurers Winding Up Rules, §2(1), definition of 'insurer' read with Financial Services and Market Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 (definition of 'insurer') (the Corporation does not conduct any Regulated Activities Order, §10 activity).

³³ *Viz.*, Financial Services and Market Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a) read with Regulated Activities Order, §13.

Administration Order³⁴ (similarly not to SYA participants³⁵); and formerly (before their revocation by Reorganisation Regulations), Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001³⁶ (similarly not to SYA participants³⁷).

fate of surplus and deficit

- 2.8 Presumably the only event in which a surplus (inherently unlikely) could properly be distributed to Members for the time being would be at the end of the Corporation's appropriate insolvency process when all Corporation debts and all Members' insurance liabilities had been finally determined and disposed of, there was no further call on the Corporation's funds under its objects, and all other liquidation commitment had been discharged.

fundamentals

introduction; birth; death

- 2.9 Given the Corporation's importance in the Lloyd's enterprise, and widespread error concerning its name and nature, some of its fundamentals³⁸ are now briefly considered. By 1870, it was expedient³⁹ to the "committee for managing the affairs of Lloyd's"⁴⁰ to formally request Parliament to create a new, distinct, independent legal person⁴¹ separate from both the members of that committee and subscribers to

³⁴ Because the Corporation is not an 'insurer': Insurers Administration Order, §3 read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 (definition of 'insurer') (the Corporation does not conduct any Regulated Activities Order, §10 activity).

³⁵ Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 (definition of 'insurer') read with Regulated Activities Order, §13.

³⁶ SI 2001/2968: see Financial Services and Markets Act 2000 (Treatment of Assets of Insurers on Winding Up) Regulations 2001 (SI 2001/2968), §2 (definition of 'insurer') read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 (definition of 'insurer') (the Corporation does not conduct any Regulated Activities Order, §10 activity, though see FSA Glossary, definition of "Society").

³⁷ *Viz.*, Financial Services and Market Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a) read with Regulated Activities Order, §13.

³⁸ See *Astor's Law of Lloyd's*, 2nd Ed.

³⁹ Lloyd's Act 1871, recital [3]:-

[T]he affairs of the Society, and the business conducted by its members as such, are of large and increasing magnitude and importance, but the constitution of the Society is imperfect, and difficulties arise therefrom in relation to legal proceedings, and the management of the affairs of the Society and the incorporation of its members with proper powers would be of great benefit to the shipping and mercantile interests of the United Kingdom, and it is therefore expedient that they be incorporated...

"They" is conceptual error: by Lloyd's Act 1871, s.3 an entirely new person is being incorporated, not a group of existing persons already corporeal. On the legal proceedings referred to, see for example *Forwood v Lloyd's*, May 23, 1873, , unreported (see the Hurst, Cornfield & Hurst report in the Corporation's Business Intelligence Centre). The theme of incremental growth in the Lloyd's enterprise recurs in subsequent Lloyd's Acts: see for example Lloyd's Act 1951, fourth recital ("the number of and the business carried on by members of the Society and the activities of the Society have increased and are increasing"); Lloyd's Act 1982, recital (5) ("Since 1968 the number of persons resident outside the United Kingdom admitted as members of the Society and the total number of members of the Society have both greatly increased").

⁴⁰ See Lloyd's Act 1871, s.4, etc.

⁴¹ Creating a corporation is a device of considerable antiquity and versatility: per James Grant, *A Practical Treatise on The Law of Corporations* (Butterworths, 1850), p.4, it was a means by which:-

municipalities were furnished with a form of government that never wore out; charitable trusts were secured to the objects of them so long as such objects should continue to be found; the protection, improvement and encouragement of trades and arts were permanently provided for; and learning and religion kept alive and cherished in times through which, probably, no other means can be mentioned that would appear equally well qualified to preserve them.

the alleged⁴² 1811 deed of association. Lloyd's Act 1871, s.3,⁴³ bought and paid for by the then subscribers, created, not without material debate in both Houses,⁴⁴ one⁴⁵ new legal person, for various purposes including contracting,⁴⁶ litigation,⁴⁷ debt recovery,⁴⁸ property vesting,⁴⁹ and trusteeship.⁵⁰ The section's infelicitous drafting⁵¹ has engendered misunderstanding and nomenclatural error.⁵²

⁴² That there was a 1811 deed of association, and that its original was destroyed in the Royal Exchange fire, it appears unnecessary to dispute. That that deed was in the form set out at *Wright & Fayle* is a different matter.

⁴³ Lloyd's Act 1871, s.3:-

[A]ll persons admitted as members of Lloyd's before or after the passing of this Act, are hereby united into a Society and Corporation for the purposes of this Act, and for those purposes are hereby incorporated by the name of Lloyd's, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose, of lands and other property (which incorporated body is hereafter in this Act referred to as the Society).

⁴⁴ Lloyd's Act 1871's extensive legislative history (readings, select committee, amendments, etc.) is recounted at *Astor's Law of Lloyd's*, 2nd Ed. (similarly the legislative histories of Lloyd's Acts 1888, 1911, 1925, 1951 and 1982).

⁴⁵ The familiar "Society and Corporation of Lloyd's" is a myth: see ¶2.16.

⁴⁶ See Lloyd's Act 1871, s.5; *Lloyd's v Harper* (1880) 16 Ch. D. 290, 308 (Fry J).

⁴⁷ Lloyd's Act 1871, s.6:-

Notwithstanding the annulling and incorporation aforesaid, any action, suit, prosecution, or other proceeding instituted before the passing of this Act by or against the Committee for managing the affairs of Lloyd's, or any person or trustee as aforesaid, shall not abate or be discontinued or be prejudicially affected by this Act, but on the contrary, shall continue and take effect both in favour of and against the Society, as it would have done in favour of or against that Committee, or the members thereof, or any of them, or any person or trustee as aforesaid, if this Act had not been passed, the Society being only substituted in or in relation thereto respectively for that Committee or the members thereof, or any one or more of them, or such person or trustee.

And see *Forwood v Lloyd's*, May 23, 1873, unreported (see the Hurst, Cornfield & Hurst report in the Corporation's Business Intelligence Centre). One of the Corporation's first litigious acts after incorporation was to apply to the Chancery Division for a declaration enforcing a guarantee given on behalf of a Member: *Lloyd's v Harper* (1880) 16 Ch. D. 290, 295 (CA).

⁴⁸ Lloyd's Act 1871, s.7:-

All debts due to the Committee for managing the affairs of Lloyd's, or to any person or trustee as aforesaid, with all interest (if any) due or to accrue due thereon, shall be paid to the Society, and shall be recoverable by them, and all debts due by such Committee person, or trustee as aforesaid, with all interest (if any) due or to accrue due thereon, shall be paid by the Society and shall be recoverable from them.

⁴⁹ See Lloyd's Act 1871, s.4; *Lloyd's v Harper* (1880) 16 Ch. D. 290, 307-308 (Fry J); 315 (James LJ).

⁵⁰ Lloyd's Act 1911, s.8(1), repealed by Lloyd's Act 1951, s.5(3) and re-enacted in *ibid.*, s.5(1) as amended by Lloyd's Act 1982, s.15(1)(d)).

⁵¹ The abbreviation "Society" for the Corporation is fundamentally misconceived (as discussed in the present Chapter). For other infelicities, see for example Lloyd's Act 1871, recital [3]: "[T]he incorporation of its members with proper powers would be of great benefit ... and it is therefore expedient that *they* be incorporated ..."; *ibid.*, s.3 ("*persons* admitted as members of Lloyd's before or after the passing of this Act, are hereby united into a Society and Corporation"). See subsequently Lloyd's Act 1888, recital [1], Lloyd's Act 1911, recital [1], Lloyd's Act 1951, recital [1], Lloyd's Act 1982, recital (1) ("certain *persons* were united into a society or corporation"). See also Lloyd's Act 1871, s.28 and 42 (the phrase "the Society as incorporated by this Act"). See also Lloyd's Act 1871, s.7 ("... shall be paid to the Society, and shall be recoverable by *them* ... and from *them*"). For contradiction, see Lloyd's Act 1871, recital [3] ("... and that provision be made for the government of the Society and the conduct of *its* affairs") and *ibid.*, s.3 ("... are hereby *united* into a Society and Corporation"). For later incidents of "its" rather than "their", see for example Lloyd's Act 1982, s.14(6) ("For the purposes of this section 'the Society' means the Society *itself* and also any of *its* officers ..."). See also for example Lloyd's Act 1871, s.4 and 28 ("members of Lloyd's") but *ibid.*, s.10 and 20 ("Members of the Society"); s.5, 6, 7, 8, 9 ("affairs of Lloyd's") but *ibid.*, s.10 ("objects of the Society") — distinctions without apparent difference. Likewise *ibid.*, s.33 ("secretary of Lloyd's" and "secretary of the Society"). Also *ibid.*, s.39 ("The Society, and any other *society*, association, or corporation..."). For erroneous syntax, see for example Lloyd's Act 1871, s.7 ("All debts due to the Committee ... shall be paid to the Society, and shall be recoverable by them"), and *ibid.*, s.27 ("to be printed by direction of the Society, and to be authenticated by *their* common seal; and the signature of *their* secretary shall be evidence..."). Conscious of its own inconsistency, the (now obsolete) May 18,

- 2.10 *Ibid.*, s.2⁵³ annulled that deed of association,⁵⁴ subject only to various legal fictions preserving the *status quo* only so far as transitionally convenient.⁵⁵ Though embodying somewhat the 'beautiful combination of the legal characters of the finite being with the essentials of infinity',⁵⁶ the Corporation may be killed off at any time by statute in the ordinary way. Its subsistence would be jeopardised by its permanent loss of all Members (as, for example, by the simultaneous due-process, EU-adjudicated or -declared insolvency⁵⁷ of all SYA participants if they constituted the entirety of the current Membership⁵⁸) or the frustration or exhaustion of its objects.⁵⁹

corporateness; not a company or society

- 2.11 The Corporation is a private corporation aggregate, not a public⁶⁰ body, public corporation⁶¹ or government department.⁶² It is not a company,⁶³ registered or unreg-

1927 Agreement Constituting the Central Fund began by stating "*sometimes* hereinafter referred to as 'the Society'". For drafting inconsistency in public general Acts, see for example Insurance Companies Act 1982, s.83 ("underwriter") and ss.84-86 ("members of Lloyd's"), for no apparent reason. Italics added.

⁵² See ¶2.16.

⁵³ Lloyd's Act 1871, s.2:-

On the passing of this Act, the deed of association, dated on or about the thirtieth day of August one thousand eight hundred and eleven, executed by members of the Establishment or Society of Lloyd's as existing before the passing of this Act, and any deed executed by other members by way of accession thereto, shall be and the same are and each of them is hereby annulled.

Before Lloyd's Act 1871, the Establishment was managed by and its property vested in a committee, the members of which held Establishment property on trust for the members as a whole for the time being in accordance with the 1811 deed: see Appendix 1.

⁵⁴ The instant before Lloyd's Act 1871, s.3 created the Corporation, the Lloyd's enterprise principally comprised: (1) an unincorporated administrative establishment of waiters (and other functionaries), and the Room's boxes, somewhat resembling a coffeehouse; (2) an unincorporated association of subscribers governed by an alleged, apparently lost August 30, 1811 deed of association; a 1838 restatement described Lloyd's as "an Establishment or Society", a formula repeated in Lloyd's Act 1871. Given the two separate bodies, "or" was not accurate, notwithstanding that one governing committee of the society — known to itself and others as the "committee for managing the affairs of Lloyd's" — controlled the Establishment's budget and staff, and the society's membership and relevant collective funds, under one deed of association. Indeed, the two continually distinct components of the same enterprise militated in favour of dispensing with both of them and creating a new corporation. The alleged 1811 trust deed is set out in *Astor's Law of Lloyd's*, 2nd Ed. and can presumably be obtained from Lloyd's.

⁵⁵ See for example Lloyd's Act 1871, s.5.

⁵⁶ James Grant, *A Practical Treatise on The Law of Corporations* (Butterworths, 1850), p.4 (referring to corporations generally).

⁵⁷ See Lloyd's Act 1982, s.9.

⁵⁸ The effective date of notice of Membership resignation being in the Council's control, the Corporation is unlikely otherwise to find itself with no Members.

⁵⁹ A corporation set up (including statutorily) for a specific purpose is dissoluble when those purposes have been performed: *R v Mayor [etc.] of Colchester* 2 Dougl. El. Cas. 59, note D; Anon., Dyer, 100, pl. 70; etc. But see *Thicknesse v Lancaster Canal Co.* 4 M&W 472. If the Corporation's objects comprised only its first two statutory objects, then the permanent loss of all Members (for example, by their simultaneous bankruptcy: see Lloyd's Act 1982, s.9) might have that effect. But the Corporation's third object appears to be independent of Members.

⁶⁰ And the Corporation is presumably not a "public body" within Public Bodies Corrupt Practices Act 1889, s.7, Prevention of Corruption Act 1916, s.4(2), or otherwise. Nor is it incorporated by special Act to carry out any undertaking for the benefit of the public.

⁶¹ The Corporation is not to be confused with the public corporation aggregate of the sort discussed in (for example) *Tamlin v Hannaford* [1950] 1 KB 18, 22 (Denning LJ), examples of which are or were the Bank of England, the East India Company, the Hudson's Bay Company, and various universities.

⁶² The UK government does not own any part of the Lloyd's enterprise, and it is a myth that Corporation staff are civil servants.

istered (with members' liability limited by shares, guarantee or otherwise), and has no directors properly so called.⁶⁴ The Corporation's constitution is at Lloyd's Acts 1871-1982 (all private Acts); its formal statutory objects are at Lloyd's Act 1911, s.4. It cannot properly be called a society, nor is it synonymous with Members collectively, for it has — and the point of creating it was that it should have — a continuing legal existence and single personality distinct and separate from each and all of them.⁶⁵

role

- 2.12** The Corporation's role is limited yet extensive. For example (as discussed elsewhere⁶⁶): (1) it never sells insurance; (2) its statutory objects⁶⁷ give it no independent mission, trade or vocation of its own, and appear to make it wholly subordinate to SYA participants' insurance businesses, to which extent the Corporation is best visualised as a hollow shell existing principally for the self-regulatory convenience of the Council and the administrative and commercial convenience of Members; (3) it carries out numerous self-regulatory functions as the Council's servant (contributing to the wholly false impression that it has self-regulatory powers in its own right⁶⁸); (4) Membership founds the Council's self-regulatory jurisdiction over the SYA participant; (5) the Corporation provides numerous administrative services directly or indirectly to Members, sometimes as their agent or sub-agent or through Corporation subsidiaries and others, particularly in relation to (for example) policy issuing, claims processing, centralised accounting, centralised money transmission, and electronic data; it arranges the provision of funds to enable Members individually and collectively to comply with external insurance regulatory financial requirements;⁶⁹ in these respects, there have recently been significant developments.⁷⁰

⁶³ See multiple error at *State Dept. of Ins. v Arthur J. Gallagher & Co.*, 622 So. 2d 370, 371 ("There was no dispute that Gallagher and Lloyds are reputable companies"). Companies Act 1985, s.735(1):-

(a) "company" means a company formed and registered under this Act, or an existing company; (b) "existing company" means a company formed and registered under the former Companies Acts, but does not include a company registered under the Joint Stock Companies Acts, the Companies Act 1862...; (c) "the former Companies Acts" means the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983.

Nor is the Corporation an unregistered company (see *ibid.*, s.718). Examples of error include SEC *amicus* brief in *Richards*, p.1 ("Defendant, Lloyd's of London, an English company ..."; the SEC also erred on the Corporation's name, which is not Lloyd's of London..

⁶⁴ "Chief executive", "managing director" and "director" in relation to Corporation employees are courtesy titles.

⁶⁵ See for example *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 Q.B.D. 470; *Acland v Lewis* (1860) K&G 334, 343 (Erle CJ); *Salomon v A. Salomon & Co. Ltd.*, *Broderip v Salomon* LR [1897] A.C. 22, 42, 45 (Lord Herschell); 50-1 (Lord Macmillan), etc. The distinction between the Corporation and Members is recognised in, for example, General Undertaking, §2.1.

⁶⁶ See *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁷ See §2.18.

⁶⁸ LLD, §1.2.1 is utterly mistaken on this point. There is no legal or rational basis for arguing that the Council is (and previously the Old Committee was) synonymous with the Corporation. On the general point, see *Wenlock v River Dee Co.* (1885) 10 App. Cas. 354 (HL). If Parliament had intended to confer any express power on the Corporation, it would have done so. Indeed, the Corporation should be careful as to the powers that it purports to exercise: see generally *Halsbury's Laws*, 4th Ed. (1998), vol. 9(2) ('Corporations'), §1137 ('Statutory corporations').

⁶⁹ All these matters are discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁰ See Historically *LMB Priorities* 1999, p.16-17.

what it is not

- 2.13** Confusion and error are pandemic concerning the Corporation, especially what it is properly called,⁷¹ what it is, and what it does. Inapposite to refer to any component of the Lloyd's enterprise other than the Corporation, the word "Lloyd's" is endemically abused, not least by self-regulators-at-Lloyd's⁷² and lawyers,⁷³ misdescribing the Corporation, sometimes to considerable confusion,⁷⁴ as (for example):-

(1) a contractual insurer⁷⁵ and thus, by implication, SYA participants. The Corporation never (at least not expressly contractually) sells insurance; nor do any of its

⁷¹ See ¶2.15.

⁷² See for example recently Mkt. Bn. Y2131, September 17, 1999 ("Hong Kong"):-

Historically, Lloyd's [SYA participants] has been exempted from most of the regulatory requirements applicable to an authorised insurer in Hong Kong. ... For the past two years Lloyd's [self-regulators-at-Lloyd's] has been in discussion with the IA with the aim of ensuring that the revised trading arrangements continue to take account of Lloyd's [the Lloyd's enterprise's] unique structure and mode of operation. See the examples given in the following footnotes.

And see for example *Lloyd's: A Sketch History* (Lloyd's):-

Lloyd's ... is an organisation of many different yet complementary facets: a corporation; a society of underwriters; an international insurance market; publishers; the world centre of marine intelligence; and a major City landowner. Each and all of these descriptions apply to Lloyd's.

⁷³ See for example *S&M*, §52(a) (p.19; "Lloyd's" to describe self-regulators-at-Lloyd's); *ibid.*, §55 (p.20; "Lloyd's" to describe the Lloyd's enterprise); *ibid.*, §57 (p.21; "Lloyd's" to describe Members); *ibid.*, §58 (p.21; "Lloyd's" to describe the Corporation). And see *Lloyd's v Clementson* {1b} [1995] LRLR 307, 332 (Hoffmann LJ):-

For some purposes it presents itself as a single institution seeking to preserve or increase its market share against outsiders and for other purposes it acts as an association of individual insurers, each competing with each other as well as with outside insurers.

⁷⁴ See for example relevant US federal diversity cases.

⁷⁵ Mutualisation of SYA participants' liabilities (on which see Chapter 4, etc.) is not insurance; nor does mutualisation (the affair of Members) necessarily have anything to do with the Corporation (a separate person which makes no contributions to the Central Fund). Examples of error include (for example): include: (1) legislation: First Non-Life Directive, §16(5), second § ("The details, together with the relevant calculations shall be sent to the authorities of the countries where Lloyd's is established") and Insurance Accounts Directive, Annex, B, §11 ("Lloyd's life-assurance business"); (2) English litigation: *Eide UK Ltd. v Lowndes Lambert Group Ltd.* [1998] 3 WLR 643, 646 (Phillips LJ; "[T]he brokers procured two hull and machinery policies, one with Lloyd's ..."); *Container Transport International Inc. v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1984] 1 Lloyd's Rep. 476, 506 (Kerr LJ; "... insurers of the calibre of Lloyd's"; "... reinsurance of Lloyd's"); *ibid.*, 519, 521-2 (Parker LJ); *Barratt Bros. (Taxis) v Davies* [1966] 2 Lloyd's Rep. 1, 3 (Denning MR; "Under the policy Lloyd's agreed ..."); *The Merak*; *T. B. & S. Batchelor & Co., Ltd. (Owners of Cargo on The Merak) v Owners of S. S. Merak* [1964] 2 Lloyd's Rep. 283, 289 (Scarman J; "On Dec. 27, 1962, solicitors for the owners wrote to Lloyd's repudiating liability ..."; they did not). For compound terminological infelicity, see *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd's Rep. 132, 134 (Kerr LJ; "The two plaintiffs are a representative Lloyd's Underwriter and a representative Institute of London Insurance company. For convenience and brevity I will refer to them collectively as "Lloyd's"; and see *ibid.*, 135 ("he had previously placed the C.T.I. cover with Lloyd's, in particular since Lloyd's ... had themselves made this allegation against Heath ...") — all the judge's uses of "Lloyd's" are erroneous); (3) US and other litigation: See for example *K. Bell & Associates, Inc. v Lloyd's Underwriters*, 97-7397 2d Cir. 1997 U.S. App. LEXIS 31872; *Golden Door Jewelry Creations, Inc. v Lloyds Underwriters Non-Marine Association, an association licensed to underwrite insurance in the State of Florida, et al.*, 117 F.3d 1328; *Pickett v Lloyd's & Peerless Ins. Agency A-22*, 131 N.J. 457, 462; 621 A.2d 445 ("At the time of the accident, Pickett had a \$30,000 physical-damage policy for his truck with defendant Lloyd's, an underwriting syndicate"); *Diamond Shamrock Chems. Co. v Aetna Cas. & Sur. Co.* A-694-89T1 N.J. Super. LEXIS 138 (1992), *1, ("Lloyds is a collection of syndicates"; it is not); *Golden Door Jewelry Creations, Inc. v Lloyds Underwriters (Golden Door I)* 748 F. Supp. 1529 (SD Fla 1990) at 1539 ("Now, this policy has all the indicia of a liability policy. It gives the insurance company underwriters, Lloyds ..."). For compound error, see *Bell v Timmouth*, 43 D.L.R. 4th 468, 496 (Carrothers JA; "We have before us an application for an order quashing an appeal, which application to quash has been made by the respondent Timmouth, representing members lifted in an insurance policy of the Institute of London Underwriters (whom, for convenience, I shall refer to collectively as "Lloyds)"). For relative accuracy, see *Foster v Kentucky Hous.*

statutory objects⁷⁶ envisage it doing so. Insurance is bought at, never from, Lloyd's (the FSA Glossary's definition of "insurer"⁷⁷ includes the Corporation, but that appears to be a drafting error). Insurance products are sold at Lloyd's only by individual SYA participants — never by syndicates⁷⁸ — who are not synonymous with Lloyd's (on which point EU legislation errs⁷⁹). SYA participants' annual accounts — in aggregated form often erroneously called 'syndicate accounts', and in super-aggregated form often erroneously called "Lloyd's global accounts" — are not, and have virtually nothing to do with, the Corporation's accounts.⁸⁰ The Corporation does produce and seal policies (or procure the foregoing⁸¹) embellished with its personal crest, but generally as each SYA participant's express contractual agent, not as a principal.⁸² Nor is the Corporation a trading vehicle for Members,⁸³ nor are

Corp., 850 F. Supp. 558, 559, n.1 etc. ("The plaintiff, David G. Foster, is a citizen of the United Kingdom and an underwriter at Lloyd's, London which issued the policy in question. For clarity purposes, the plaintiff hereinafter will be referred to as Lloyd's. ... In this declaratory judgment action, the plaintiff seeks a determination that the policy issued by Lloyd's ..."); *Alexander & Alexander Servs. v Lloyd's Syndicate* 317, 902 F.2d 165 (2nd Cir. 1990); (4) self-regulators-at-Lloyd's: self-regulators-at-Lloyd's use the word Lloyd's extensively to refer to SYA participants, self-regulators-at-Lloyd's and the Lloyd's enterprise, to general confusion. See also the multiple confusion at, for example, *Managing Agency & Syndicate Guidance* 1998, App. 2, §3.2 (p.85; "Lloyd's trading status as an accredited reinsurer"; "At present Lloyd's is an accredited reinsurer in all states except Michigan, Arizona, Kansas and Colorado. Lloyd's is working to restore accredited status in these states in the near future. Lloyd's completes filings centrally on behalf of all syndicates in each of the 50 states in order to maintain Lloyd's trading status as an accredited reinsurer in such states, enabling cedants to take credit for reinsurance placed at Lloyd's. Lloyd's status is based largely upon the existence of the Lloyd's US-situs credit for reinsurance trust funds and upon the filing of central information relating to Lloyd's global solvency"); (5) colloquial: "Lloyd's results" to refer to the results not of the Corporation but of SYA stamps; "Lloyd's premium income" (at, for example, <http://www.lloyds.com.businfo/keyfacts/wwpresence/body.htm> (July 13, 1998): the Corporation does not have any premium income; (6) press: see for example multiple error at *The Observer*, June 1, 1997, *Business*, p.3, in the context of the Corporation suing Richard Rogers Partnership and others in relation to the rusting pipes on Lloyd's 1986 Building ("Ironically, if Lloyd's is successful it is likely, as an insurer, to have to pay some of the engineers' and constructors' claims"); (7) R&R: RRC 14, §20.4.1 ("... to enable Lloyd's to continue to underwrite business in Illinois"); (8) other: see for example *NYID Report* 1995, May 11, 1995 cover letter, p.1 ('Whenever the term "Lloyd's" appears herein without qualification, it should be understood to indicate the members of Lloyd's underwriting community'). Occasionally a like error is made concerning Institute of London Underwriters: see for example the multiple inventions at *Berns & Koppstein, Inc. v Orion Insurance Co., Ltd.* [1960] 1 Lloyd's Rep. 276, 278 (Heralds DJ; "The defendants represent certain members of two insurance syndicates known as Underwriters at Lloyd's and the Institute of London Underwriters, who issued the policies through the Corporation of Lloyd's") — ILU is not an insurer and does not issue London company documentation through LPSO.

⁷⁶ See ¶2.18.

⁷⁷ See FSA Glossary, definition of "Society".

⁷⁸ See ¶2.117.

⁷⁹ See ¶2.7.

⁸⁰ Corporation RA 1996, p.30 (Notes to the financial statements, note 2A):-

The [Corporation's] financial statements exclude all insurance related activities arising from members underwriting as Names at Lloyd's.

Concerning the Corporation's latest RA (fye December 31, 1999), neither the cover nor the p.1 table of contents of the booklet in which they were published ("Global results 1999") indicated their presence (at *ibid.*, p.33 *et seq.*).

⁸¹ LPSO and its successor, and London market processing generally, are outside this work's scope. A discussion can be found at the usual source.

⁸² *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports 98, 101 (Scrutton LJ):-

[I]t cannot be too clearly understood by those who do not know anything about it that Lloyd's does not insure; Lloyd's as such never insures; the corporation never insures. ... Lloyd's insures nobody and takes no liability.

The statement is definitive only as to express insurance contracts to which SYA participants are party. See similarly *Industrial Guarantee Corporation, Ltd. v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J), commenting on a promotional pamphlet put out by Lloyd's:-

Members its trading organs or agents; nor generally⁸⁴ is the word "Lloyd's" a business name for SYA participants. The Corporation is never subrogated to an assured's-at-Lloyd's insurance contractual rights.⁸⁵ Whether the Corporation happens to be personally liable on insurance contracts made by SYA participants is an unresolved question;

(2) a society or association.⁸⁶ The statutory⁸⁷ and other use of "the Society" as an abbreviation for the Corporation is misconceived. A corporation's legal nature is

There is a statement that the premium income of Lloyd's is now £30,000,000 a year. As a matter of fact, Lloyd's have no premium income at all. They have not £30,000,000 or thirty pence of premium income.

See similarly *Napier and Ettrick v R. F. Kershaw Ltd.* [1999] 1 WLR 756, 759 (Lord Steyn); *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Australia, NSW Supreme Court, Equity Div., Needham J; "Lloyd's does not carry on the business of insurance"); *Eagle Star Insurance Company Ltd. v Spratt* [1971] 2 Lloyd's Rep. 116, 124 (Lord Denning MR); *McAleer v Smith* C.A. No. 88-0544L 791 F. Supp. 923, 932; *Travelers Indemnity Co. v Booker*, 657 F Supp. 280, 282 (D.DC 1987: "Contrary to the popular conception, Lloyd's is not a monolithic institution, nor does it operate in the same manner as a corporation in this country"); *Cassidy v Forum Insurance Co.* 561 N.E. 2d 1167, 1168 (Ill. App. 1990: "The Lloyd's corporation does not operate in the same manner as a United States corporation. Lloyd's provides a physical site for its members to conduct the buying and selling of insurance risks. None of these risks falls upon the corporation but upon its individual members"). And see for example Lloyd's Act 1911, s.4 ("the carrying on by its members ..."); italics added.

⁸³ Indeed, the use of the word "Lloyd's" by Members is restricted, as discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁸⁴ See the errors at for example *Foster v Kentucky Hous. Corp.* 850 F. Supp. 558, 559, n.1 etc. ("The plaintiff, David G. Foster, is a citizen of the United Kingdom and an underwriter at Lloyd's, London which issued the policy in question. For clarity purposes, the plaintiff hereinafter will be referred to as Lloyd's"). And see *Industrial Waxes, Inc v Brown* [1958] 2 Lloyd's Rep. 626, 627 (2d Cir. 1958; "These shipments are covered by marine insurance issued by a group of English underwriters, of which the defendant is a member, doing business under the name of Lloyd's").

⁸⁵ See the defective title in *Lloyds of London, as subrogee of William G. Cirincione and the Yacht "Tropic Lightning" v Cozy Cove Yacht Sales, Inc., Blackfin Yacht Corp.*, 48 F.3d 535 (11th Cir. 1995).

⁸⁶ Examples of error include: (1) legislation: see for example Lloyd's Acts 1871-1982, the use there of 'Society'; Insurance Premium Tax Regulations 1994 (1994 SI 1774), §2(1) ('In these Regulations ... "Lloyd's" means the society incorporated by section 3 of Lloyd's Act 1871'); First Non-Life Directive 73/239/EEC, §8.1(a) (as substituted by Third Non-Life Directive, 92/49, §6); First Life Directive 79/267/EEC, §8.1(a) (as substituted by Third Life Directive 92/96/EEC, §5) and Insurance Accounts Directive, nineteenth and twenty-second recitals and *ibid.*, §4 ("the association of underwriters known as Lloyd's"). The terminological error is compounded in *ibid.*, Annex, A ("For the purposes of this Directive, both Lloyd's and Lloyd's syndicates shall be deemed to be insurance undertakings" — neither the Corporation nor any syndicate sells insurance); (2) English litigation: *Ashmore v Lloyd's* [1992] 1 WLR 446, 449 (Lord Templeman; "Lloyd's is a society of individual underwriters incorporated by statute and authorised by its constitution to exercise supervisory, regulatory and disciplinary power over its members"; the Corporation is not a society and is not expressly authorised by its constitution to exercise any power over anyone); *Deeny v Gooda Walker (in liquidation) (No. 2)* {5b} [1996] LRLR 109, 110 (Peter Gibson LJ; "Lloyd's is a society of individual underwriting members"); *R v Lloyd's ex parte Briggs* [1992] COD 456 (Laws J's persistent use of "Society" to describe the Corporation; quoted at *ibid.*, [1993] 1 Lloyd's Rep. 176, 185 (Leggatt LJ)). And see *Lloyd's v Clementson* {2} [1997] LRLR 175, 246 (Cresswell J); *Lloyd's v Clementson* {1b} [1995] LRLR 307, 322 (Bingham MR; "Mr. Mason was subjecting himself to the regulatory jurisdiction of a body of which he was becoming a member and consisting of his fellow-members"; *ibid.*, 323 (Bingham MR; "Lloyd's ... is a Society of individual underwriting Names, grouped in syndicates"; — it is neither); see similarly *ibid.*, 330 (Steyn LJ) ("Lloyd's is an association of members"); (3) US litigation: *Lowsley-Williams v North River Ins. Co.*, 884 F. Supp. 166, 167 ("Lloyd's is an association ..."); *In the Matter of Lloyd's of London*, State of West Virginia, West Virginia Securities Division, Summary Notice to Cease and Desist and Notice of Right to Hearing, Case No. E95-0846, January 22, 1996, Findings of Fact, §2 ("Lloyd's is comprised, in part, of a society of persons known as members"); (4) Australian litigation: *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep., 103, 107 (Australia; NSW Supreme Court; Equity Div., Needham J; "It will be apparent ... that Lloyd's does not carry on the business of insurance. It is a Society comprised of persons some of whom carry on the business of insurance ..."); (5) other: *Fisher WP*, §6.02 (p.33); *Treasury Sel. Comm. I*, §5 ("Lloyd's was first incorporated as a Society by the Lloyd's Act 1871"); *NYID Report 1995*, p.2-3 ("Lloyd's ... comprises a society of underwriters incorporated in 1871 ..."). And see the multiple error at

fundamentally different from that of a society. Being one person distinct and separate⁸⁸ from Members,⁸⁹ endowed with its own objects,⁹⁰ Lloyd's cannot logically be, and in law is not, a society or an association.⁹¹ The familiar term "Society of Lloyd's",⁹² used by the Corporation itself for various purposes,⁹³ and by the FSA,⁹⁴ is misconceived. The phrase 'Society as a whole'⁹⁵ is incoherent;

(3) Members collectively,⁹⁶ the correct term for whom is "members of Lloyd's collectively" (or similar), not "Lloyd's"⁹⁷ or "the Society": Members collectively are not synonymous with the Corporation;

H. Comminellis, *Excess & Surplus Lines Insurance: Slow Growth and Sharpening Competition*, in *Journal of Reinsurance*, Summer 1998, p.51, 57 ("The 310-year-old insurance society Lloyd's ...").

⁸⁷ See Lloyd's Acts 1871-1982, *passim*. The error started at Lloyd's Act 1871, s.3.

⁸⁸ Otherwise there would be no need for, for example, Lloyd's Act 1871, s.40.

⁸⁹ Lloyd's Act 1871, s.3 makes the Corporation one homogenous independent self-contained free-standing person, endowed with objects (see now Lloyd's Act 1911, s.4). Textbooks on English corporations often describe the English corporation aggregate as, generally, both a collection of people (perhaps derived confusedly from the nature of *some* corporations aggregate) and one legal person: see for example the inconsistencies in C. T. Carr, *The General Principles of the Law of Corporations* (Cambridge University Press, 1905), p.6 ("... an invisible and impalpable entity, representing and consisting of the sum of the members ..."); James Grant, *A Practical Treatise on The Law of Corporations* (Butterworths, 1850), p.1 ("[I]t is quite true that a corporation aggregate is an abstract being, or a metaphysical body, and something altogether distinct from the aggregate of the individual members"). And see similarly *ibid.*, p.3 ("[A] bond by and in the name of all the existing corporators is not the bond of the corporation, although it be sealed with the common seal; the aggregate of the members *not* being the same thing as the corporation"), but then see the apparently contradictory *ibid.*, p.72 ("[T]he corporation is a metaphysical being, not identical with the majority, or even the aggregate, of its members ... but consisting of them ..."). For similar inconsistency see *Halsbury's Laws of England*, 4th ed. (1998), vol. 9(2), §1001 ("A corporation may be defined as a body of persons ...") but *ibid.*, §1010 ("[A] corporation is a legal person just as much as an individual").

⁹⁰ See Lloyd's Act 1911, s.4.

⁹¹ It follows that Lloyd's Act 1871, twelfth recital is infelicitous ("whereas it is expedient that provision be made for the incorporation, from time to time, by agreement, with the Society, of *other societies* ..."); italics added. "Company" and the popular legal term "company in general meeting" are similarly inherently contradictory.

⁹² See ¶2.16.

⁹³ Such as litigation: see cases up to the present brought by claimant calling itself "Society of Lloyd's" eg *Society of Lloyd's v Tropp* [2004] EWHC 33 (Comm) (January 16, 2004; Gross J). The Corporation adopted the style "incorporated by the name of Lloyd's" in R&R but appears to have resumed its previous error.

⁹⁴ See for example FSA Glossary's use of "Society", and its definitions of "arranging deals in contracts of insurance written at Lloyd's"; "authorised person", §(f); "permission", §(f); Curiously, *ibid.* (or IPRU(INS)) contains no definition of the self-avowed technical term "Society of Lloyd's". *Ibid.* does define "Society", erroneously: 'the society incorporated by Lloyd's Act 1871 by the name of Lloyd's'. The Corporation is not a society.

⁹⁵ See for example *Proposals to revise the solvency test applying to Lloyd's* (FSA, December 1999), §4 (p.1).

⁹⁶ Error includes (for example): (1) UK legislation: presumably, Insurance Companies Act 1982, s.83A ("... if there is failure by Lloyd's to satisfy an obligation ..."), all the more curious given "members of Lloyd's" a few words earlier on the same section; Insurance Accounts Directive, Annex, §A; (2) in US litigation: the SEC's May 1996 *amicus* brief in the *Richards v Lloyd's* appeal, p.6-7 ("Lloyd's ... does not underwrite insurance, but is composed of individual members ..."); *Ell Dee Clothing Co. v Marsh*, 247 N.Y. 392, 397; 160 N.E. 651; 1928 N.Y. LEXIS 1086 (1928) ("London Lloyds is a voluntary association of merchants, shipowners, underwriters and brokers ..."); *Underwriters at LaConcorde v Airtech Servs.*, 11 Fla. Law W. 300. 493 So. 2d 428, 430 ("It is a matter of common knowledge that Lloyd's of London is not an insurer, nor is it a legal entity. It is an unincorporated association of insurers"); *Luce v Lloyd's Of London*, 868 F. Supp. 625, 625 ("Lloyd's is comprised of individuals ..."); *Save Mart Supermarkets v Underwriters at Lloyd's London*, 843 F. Supp. 597, 600, n.2; *Bell & Assocs. v Lloyd's Underwriters* 92 Civ 5249 (AJP)(KTD) U.S. Dist. LEXIS 7798 (1998): ("Lloyd's is not an entity, but rather a consortium of individual investors").

(4) a self-regulator.⁹⁸ The use in litigation of "Lloyd's" *simpliciter* as a synonym for members of the Old Committee, Committee or Council⁹⁹ — erroneous in all cases

⁹⁷ See the error at First Non-Life Directive, §8(1)(a); First Life Directive, §8(1)(a).

⁹⁸ As in, for example, "Lloyd's is committed to helping Names" (*SOD*, p.5) or "Lloyd's has just passed a byelaw ...". Other examples of error include: (1) legislation: see for example Lloyd's Act 1982, recital §(6) ("It is expedient in order to enable the Society to regulate the management of its affairs ...", corrected later in the same recital ("(a) there should be established a Council of Lloyd's to have control over the management and regulation of the affairs of the Society")); (2) English judicial error: *Napier and Etrick v R. F. Kershaw Ltd.* [1999] 1 WLR 756, 759 (Lord Steyn; "The function of Lloyd's is to manage and regulate the Lloyd's insurance market"; it is not); *Lloyd's v Leighs* [1997] CLC 1398, 1399 (CA; "The society has ... purported to procure ..."); *Ashmore v Lloyd's* [1992] 1 WLR 446, 449 (Lord Templeman; "Lloyd's is a society authorised by its constitution to exercise supervisory, regulatory and disciplinary power over its members"; it is not); *Ashmore v Lloyd's* unreported, Phillips J, quoted at *Ashmore v Lloyd's* (No. 2) [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J ("In my judgment, the public undoubtedly has an interest in the proper exercise of the statutory powers and duties conferred on Lloyd's ...")); *Ashmore v Lloyd's* (No. 2) [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J; "Lloyd's is authorized by its constitution to exercise supervisory, regulatory and disciplinary powers over its members. ... It is a most important function of the Corporation to regulate the Lloyd's insurance market"; it is not, and the Corporation has no such function); *Lloyd's v Clementson* [1b] [1995] LRLR 307, 331 (Steyn LJ, in the self-regulatory context: "Lloyd's like any other statutory body, must act within the law"); *ibid.*, 332 (Hoffmann LJ); *ibid.* {2} [1997] LRLR 175, 180 (Cresswell J; "It is of fundamental importance to note that this case is ... not a general investigation into alleged regulatory failure on the part of Lloyd's"); *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 185 (QBD Divisional Court, Leggatt LJ: Lloyd's "powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's"; the Corporation does not have relevant powers, or govern, or prescribe in the way stated). An inkling of the correct distinction between the Corporation and the Council is at *Lloyd's v Clementson* {2} [1997] LRLR 175, 192 (Cresswell J). And see *Deeny v Gooda Walker* {7} [1995] 1 WLR 1206, 1209 (Phillips J)); (3) US judicial error: see for example *Richards v Lloyd's*, 135 F.3d 1289 ("Pursuant to the Lloyd's Act of 1871-1982, Lloyd's oversees and regulates the competition for underwriting business in the Lloyd's market"; it does not); *Shell v R. W. Sturge Ltd.* 850 F. Supp. 620, 626 ("The Corporation of Lloyd's was created by an Act of Parliament to regulate Lloyd's insurance market"; it was not); *Haynsworth and Leslie v Lloyd's* 121 F.3d 956, 958 (Jerry E. Smith, Circuit Judge: "Lloyd's of London is simply a trademark referring to a market for insurance, and the Corporation of Lloyd's the entity that governs that market"; the Corporation is not); *Richards v Lloyd's of London etc.* October 5, 1994 Complaint, p.10; State of Ohio, Department of Commerce, Division of Securities, Findings of fact, conclusions of law, and recommendations of the hearing officer, Case no. 94-203, March 7, 1996, p.2 ("The corporation ... regulates members"); *People of the State of California v Lloyd's [etc.]*, February 21, 1996 complaint, §1 (p.1); *In the Matter of Lloyd's of London [etc.]*, Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist. And see May 1, 1996 letter from Fried, Frank, Harris, Shriver & Jacobson's counsel for Lloyd's to State of Tennessee then Deputy Attorney General, p.2 ("Lloyd's ... disputes ... that any aspect of a Name's involvement in the Lloyd's market constitutes a "security"); (4) US lawyers' error: *Lloyd's v Feigin*, December 28, 1995 opening brief of appellant (Lloyd's), p. 4 ("The Society of Lloyd's is not an insurance company. It is a regulatory body established under English Law (the Lloyd's Acts 1871-1982) to govern an insurance market ... The Corporation of Lloyd's is the administrative arm of the Society; it owns the building in which the market is located and provides various services under the direction of the Society and its elected governing body, the Council of Lloyd's"); *Feigin v Lloyd's*, Civil Action No. 96-Z-98, Defendants' Memorandum of law in support of motion to dissolve preliminary injunction, April 10, 1996, p.1 ("The Corporation of Lloyd's (referred to below as "Lloyd's") exercises regulatory supervision of what is known as the Lloyd's insurance market ..."); (5) the Rulebook-at-Lloyd's: see recently for example Mkt. Bn. Y1017, November 18, 1998 ("Captive syndicates at Lloyd's"), p.4 ("Lloyd's has a statutory power to regulate which is derived from the Lloyd's Act 1982"); there is no such power. And see PTD (general) 1999, recital (C) ("... in consideration of Lloyd's requiring that an appropriate Premiums Trust Deed ... shall be or shall have been executed ..."); (6) other: see for example *Fisher WP*, §2.02 ("The exemptions from [outside] control which are accorded to Members of Lloyd's are dependent on the proper exercise by the Corporation ... of its responsibility to regulate the Market"; Lloyd's Act 1871, s.24 was then extant); *Walker CR*, §1.12(b) ("Lloyd's regulatory arm"); *ibid.*, §1.12(c) and (d) ("Lloyd's as regulator"); *Kent RC*, §2.14 (p.12).

⁹⁹ Lloyd's Act 1982, s.6(1) (italics added):-

The Council shall have the management and superintendence of the affairs of the Society ... and it may lawfully exercise all the powers of the Society.

— has caused considerable confusion.¹⁰⁰ Lloyd's Acts 1871-1982 confer on Lloyd's no express power¹⁰¹ to promulgate byelaws, regulations or directions or do anything else of a self-regulatory nature. Query whether Corporation employees are even permissible¹⁰² delegates of Council members. All references in LLD, Ch. 1 etc. to the Corporation having self-regulatory functions in its own right are erroneous;

(5) an insurance market.¹⁰³ Lloyd's is not an insurance or any other sort of market. Though provided, hosted, self-regulated and administered by self-regulators-at-Lloyd's, the unincorporated, incorporeal Market is not synonymous with the Corpo-

Indeed, the Lloyd's Act 1982, s.3 Council was created more than a century after the Lloyd's Act 1871, s.3 Corporation.

¹⁰⁰ See for example *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620 (Gatehouse J).

¹⁰¹ On a related point, see *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J):-
The first difficulty that the plaintiffs have to face is that the Statute [Lloyd's Act 1911, s.4] does not impose any express duty upon Lloyd's: it speak only of "objects".

¹⁰² The Corporation is not a Lloyd's Act 1982, s.6(6), (8), (9) or (11) permitted Council delegates, yet the Council appears to delegate relevant functions to it. *Ibid.*, s.6(7) permits the Council to act by Corporation employees but that is wholly different to delegating.

¹⁰³ Examples of error include: (1) legislation: Lloyd's Act 1871, Schedule, §2; Lloyd's Act 1982, s.2(1) (the definitions there of "Lloyd's broker" and "underwriting agent") and *ibid.*, ss.6(1), 6(6)(a)(i), 8(1), (2) and (3), etc.; Financial Services Act 1986, s.42. The phrase "at Lloyd's" is not used in Insurance Companies Act 1982; (2) in English litigation: *Lloyd's v Clementson* {2} [1997] LRLR 175, 188 (Cresswell J: 'The expression "Lloyd's" denotes an insurance market'); *Henderson v Merrett Syndicates Ltd.* {1a} [1994] 2 Lloyd's Rep. 193, 197 (Saville J: "Lloyd's could not exist as an insurance and reinsurance market ..."); *Moran v Lloyd's* [1981] 1 Lloyd's Rep. 423, 424 (Lord Denning MR: "Everyone has heard of Lloyd's. It is the greatest insurance market in the world"); (3) in US litigation: *Employers Mutual Casualty Co. v Owens Ins., Ltd.* Superior Court of New Jersey, Chancery Division, Morris County, Docket No. MRS-C-51-96, November 10, 1999 order ("Lloyd's" is the popular name for an insurance marketplace in London); *Haynsworth and Leslie v Lloyd's*, 121 F.3d 956 ("Lloyd's is a 300-year-old market"); *Roby v Lloyd's* 996 F.2d 1353, 1357 (2nd Cir. 1993) (Meskill CJ: "Lloyd's is not a company; it is a market"); *Employers Ins. of Wausau v Certain London Mkt. Cos.* 97-C-0409-C 1997 U.S. Dist. LEXIS 22027: ("In reality, Lloyd's is a marketplace at which Names form syndicates that offer reinsurance"); *Alexander & Alexander Services, Inc. et al. v Certain Underwriters at Lloyd's etc.*, 136 F.3d 82 ("Lloyd's operates as a marketplace for the placement of insurance"). And see the multiple error at *Smith v Lloyd's of London* 568 F.2d 1115 (5th Cir. 1978) ("Lloyd's of London is not an insurance company in the general sense. Rather, it is an exchange or a market where various individuals or groups bid on the right to insure a given risk"; it is not and they do not). And see *Shell v R.W. Sturge, Ltd.* 55 F.3d 1227 (6th Cir. 1995); (4) self-regulators-at-Lloyd's: *Introducing the Future at Lloyd's* (Lloyd's, January 1997), second text page ("Lloyd's is a market, not a company"); the then Corporation CEO in National Association of Accountants conference, Paris, April 19, 1985, *The Auditor's Role at Lloyd's*, p.1 ("The first general misunderstanding about Lloyds is that we are an insurance company./ We are not. We are a market place ..."); 1998 (undated) verification form, §(1) ("I ... recognise that Lloyd's is a market ..."); Corporation RA 1996, p.13 ("The recommendations for corporate governance made in the Cadbury and Greenbury reports are formulated in the context of public limited companies whereas Lloyd's is a market..."); (5) other: *NAIC Review 1998*, p.4 ("Lloyd's is a market, not an insurer"); W. R. Feldhaus ed., *Surplus Lines Insurance Principles and Issues*, Second Edition (Insurance Institute of America, 1997), p.4 ("Lloyd's is a market, not a corporation"); *Treasury Sel. Comm. 1*, §8 ("The underwriter negotiates with the broker on the acceptance of the risk and the level of premium to be paid. Lloyd's itself is simply the market in which this insurance business takes place"); Lloyd's statutory solvency requirements, Insurance Directorate, January 23, 1998, Annex: note by the delegation of the UK, §2 (p.1: "Lloyd's is not a company but a market in insurance"); R.L. Carter and P. Falush, *The London Insurance Market, A Report* [etc.], July 1996, p.6 ("Lloyd's is not an insurance company but a marketplace"); *PN 2*, Section 1, §1 ("Lloyd's is an international insurance and reinsurance market"); *NYID Report 1995*, p.2 ("Lloyd's is an insurance market ..."). And see the compound errors at *Standard & Poor's Rating of the Lloyd's Market* (August 1998), p.3 ("Lloyd's is an insurance market, not a single legal insurance entity") and *Whitaker's Almanac 1999*, p.627 ("Lloyd's of London is an international market ...").

ration. "Market" or "Lloyd's market" are bizarrely used as erroneous shorthand for SYA participants' several insurance businesses;¹⁰⁴

(6) other things such as a building,¹⁰⁵ a place,¹⁰⁶ the ILU,¹⁰⁷ a consortium of investors,¹⁰⁸ an imaginary group of companies,¹⁰⁹ and a hermaphrodite.¹¹⁰

personal trading

- 2.14 The Corporation is not expressly a 'not for profit' corporation.¹¹¹ Nothing in its constitution (Lloyd's Acts 1871-1982) prevents it from generating or distributing (on some basis yet to be determined) a profit from its own personal trading activities. The Corporation does to some extent operate on commercial lines,¹¹² but not in order to generate a distributable surplus. The Corporation never declares a 'profit' or distributes its trading surpluses¹¹³ (if any¹¹⁴), and no Member ever receives an investment return from it. The flow of money is usually the other way (in the case of Members, particularly in the form of initial and annual Membership fees and subscriptions). The Corporation's prospects were sufficiently substantial to enable it to

¹⁰⁴ As in, for example the DTT's *amicus* brief in *Allen v Lloyd's* ("[I]f ... Equitas is not permitted by the DTI to assume the pre-1993 liabilities of Names, it is likely that ... the market will be forced into run-off") — see 94 F.3d 923 (4th Cir. 1996), etc.

¹⁰⁵ *Honey v George Hyman Construction Co.* 63 FRD 443, 446 (DDC 1974; "The Lloyd's group is not a legal entity; rather, there is a building in London known as Lloyd's ...").

¹⁰⁶ The then Corporation CEO in National Association of Accountants conference, Paris, April 19, 1985, *The Auditor's Role at Lloyd's*, p.1 ("Lloyd's is a place where brokers and underwriters transact insurance business").

¹⁰⁷ See the multiple compound judicial error at *Mopaz Diamonds, Inc. v Institute Of London Underwriters* 822 F. Supp. 1053, 1054 ("The defendant, The Institute of London Underwriters ("Lloyds"), is a corporation organized and existing under the laws of the United Kingdom and transacts business in the United States').

¹⁰⁸ See for example *K. Bell & Assoc. v Lloyd's Underwriters* (SDNY May 26, 1998):-

Lloyd's is not an entity, but rather a consortium of individual investors, known as 'Names,' that are severally, but not jointly liable for their fraction of risk on an insurance policy.

¹⁰⁹ See for example *International Insurance Co. v Certain Underwriters at Lloyd's London*, 1991 US Dist. LEXIS 19608 (ND Ill. December 20, 1991); *Levenson v Motor Union Orion Ins. Co.* Nos. 64-861 - 64-863. District Court of Appeal of Florida, Third District. 176 So. 2d 125; 1965 Fla. App. LEXIS 4258 (1965). 176 So. 2d 125, 127 ('The second case is Franklyn Levenson against Certain Underwriters at Lloyd's London. Hereafter I will refer to those two cases or two defendants as the Lloyd companies.')

¹¹⁰ See for example *Sizemore v Lloyd's*, No. 96-1336-II, Chancery Court for Davidson County, Tennessee, June 19, 1996 Memorandum and Order:-

[p.4] The most difficult issue is that of jurisdiction. Each side takes a vastly different view of the role of Lloyd's. According to the defendant, Lloyd's is an institution which provides a market for insurance agents and has no more control over these agents than does a commodities market over its traders. The Commissioner paints a considerably different picture. According to the Commissioner, Lloyd's closely regulates and controls the agents that sell and deal with the insurance in its market [p.14] A prima facie finding is perhaps hampered by the fact that Lloyd's does not fit into the mold of most American business entities. It is androgenous and is something of a cross between a commodities market, a limited partnership, and a corporation.

¹¹¹ Nothing in its constitution prohibits the Corporation from making a profit in its trading activities: see the error at for example *McAlee v. John Does 1-10*, LEXIS 350 (1996) *4, apparently taken from an 'uncontroverted' affidavit filed in the case on behalf of the Corporation. *Ibid.*: 'According to the uncontroverted affidavit of Richard Byrnell Leathes Prior [a Corporation lawyer], the Society is a non-profit entity ...'. See the similar error at *Landoil Resources Corp. v. Alexander & Alexander Servs.*, 77 N.Y.2d 28, 31 (1990; 'The Corporation of Lloyd's is a nonprofit corporation ...').

¹¹² See the Corporation's various 'user pays' charges.

¹¹³ The Corporation's trading surpluses are accumulated and to some extent subjugated to various Council discretions and discretionarily acquired commitments to third parties: see for example Corporation RAs.

¹¹⁴ For example, in the financial year ending December 31, 1996, the Corporation sustained a deficit.

raise (on terms) a £70m loan as part of R&R,¹¹⁵ in effect on behalf of relevant SYA participants, who were required to repay it through a syndicated loan premium charge (subject to appropriate reimbursement for overpayment¹¹⁶).

names

generally

- 2.15 The word "Lloyd's" *simpliciter* is apt only to describe, and is the *only* correct name of, the Corporation.¹¹⁷ Noteworthy is fundamentally misconceived mis-use¹¹⁸ in EU

¹¹⁵ Mkt. Bn. Y2116, August 16, 1999 ("Members' subscriptions, premium charge, New Central Fund contributions and other charges for 2000"), p.2:-

2.1 The premium charge is used to repay the syndicated loan facility, raised as part of the future market contribution to the reconstruction [R&R] programme. It is expected that premium charge proceeds will repay the loan by the end of 2001. However, premium charge receipts are dependent upon the level of Lloyd's premiums and, in the event that forecast receipts were to become insufficient to service the loan, it might be necessary to increase the rate. 2.2 The premium will continue to be imposed on all members underwriting for the 1997 and subsequent years of account for the duration of the loan. ... 2.3 The premium charge will continue to be levied on substantially all premium income for risks allocated to the 1997 or subsequent years of account, processed and settled on or after 1 January 1997. The premium charge, which is a syndicate expense, is payable monthly.

¹¹⁶ See for example Mkt. Bn. Y2481, February 9, 2001 ("Premium charge refund"), p.1. *Ibid.*, p.2 (but query what it means):-

The reimbursements are made by the Corporation of Lloyd's since the overpayments have already been applied to the repayment of the Syndicated Loan. Consequently, such payments by the Corporation represent accelerated repayments of the Syndicated Loan.

Note *ibid.*'s erroneous use, *passim*, of "syndicate" for "SYA participants". Syndicates do not pay or overpay anything and are not reimbursed anything.

¹¹⁷ See Lloyd's Act 1871, s.3.

¹¹⁸ See for example: (1) First Non-Life Directive, §§8.1(a) ("association of underwriter known as Lloyd's"); 10.2(d) ("With regard to Lloyd's..."; "must ... be able to bind the Lloyd's underwriters"); 16.5 ("In the case of Lloyd's ... the countries where Lloyd's is established"); (2) First Life Directive, §§8.1(a) ("association of underwriters known as Lloyd's"); 10.2(d) ("With regard to Lloyd's..."; "must ... be able to bind the Lloyd's underwriters"); 19(b) ("In the case of the association of underwriters known as Lloyd's ... the countries in whose territory Lloyd's is established"); (3) Council Decision 91/370/EEC, June 20, 1991, on the conclusion of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance, Annex 3 ('Listing of acceptable legal forms'), §B.12 ("the association of underwriters known as Lloyd's"). And see *ibid.*, Annex 4 ('particular provisions for certain member states of the Community'), §4:-

re paragraph 10.1(c)— with regard to the association of underwriters known as Lloyd's, submission of the balance sheet and the profit and loss account shall be replaced by the compulsory presentation of overall annual trading accounts covering the insurance operations, and accompanied by an affidavit certifying that auditors' certificates have been supplied in respect of each insurer and showing that the liabilities incurred as a result of those operations are wholly covered by the assets. These documents must allow the supervisory authorities to form a comparable view of the state of solvency of the Association[.]

The exact regulatee is not clear, and it is possible that the EU does not genuinely know exactly what it is regulating. And see *ibid.* ("the association of underwriters known as Lloyd's ... be able to bind the Lloyd's underwriters concerned"). And see *ibid.*, Protocol 1 ('Solvency margin'), §2.4 ("the association of underwriters known as Lloyd's ... if the association of underwriters known as Lloyd's is established there"); (4) Insurance Accounts Directive, nineteenth and twenty-second unnumbered recitals; *ibid.*, §4 ('the association of underwriters known as Lloyd's'). And see *ibid.*, Annex, §A:-

For the purposes of this Directive, both Lloyd's and Lloyd's syndicates shall be deemed to be insurance undertakings. [Per Insurance Accounts Directive, §2, 'insurance undertaking' means (so far as presently relevant): 'companies and firms within the meaning of the second paragraph of Article 58 of the Treaty which are — (a) undertakings within the meaning of Article 1 of Directive 73/239/EEC [First Non-Life Directive] ...; (b) undertakings within the meaning of Article 1 of Directive 79/267/EEC [First Life Directive] ...; (c) undertakings carrying on reinsurance business.'] Subject to the ... adaptations set out in section B — [first unnumbered indent] Lloyd's syndicates shall prepare annual accounts ("syndicate accounts"), and [second unnumbered indent] Lloyd's shall prepare aggregate accounts ("aggregate accounts") in place of the consolidated accounts prescribed in Directive 83/349/EEC.

(5) Council Directive 92/96/EEC (November 10, 1992) on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/276/EEC and 90/619/EEC, §21:-

legislation of the Corporation's legal name to refer, apparently and with varying degrees of consistency,¹¹⁹ to underwriting Members and or SYA participants, an unserviceable approach since the Corporation is not synonymous with either Members collectively or SYA participants collectively. The error may be a basis for (among other things) the FSA Glossary's erroneous definition of the Corporation as an "insurer".¹²⁰

fictitious names

- 2.16 In addition to using the Corporation's correct name erroneously, use of fictional names are endemic, perhaps because of the statutory use¹²¹ of 'Society' as a misconceived abbreviation for the Corporation, and or colloquial use of the word "Lloyd's" *simpliciter* as misconceived shorthand for SYA participants. For example:-

(1) "the Society" *simpliciter* to describe self-regulators at Lloyd's,¹²² the Corporation,¹²³ Members collectively,¹²⁴ Members or SYA participants,¹²⁵ and or something

In the case of the association of underwriters known as Lloyd's, asset categories shall also include guarantees and letters of credit issued by credit institutions within the meaning of Directive 77/780/EEC or by assurance undertakings, together with verifiable sums arising out of life assurance policies, to the extent that they represent funds belonging to members.

'Members' is not defined. In Directive 98/78/EC of the European Parliament and the Council (October 27, 1998), no sign that a SYA participant or SYA stamp is considered an 'insurance undertaking', 'reinsurance undertaking', 'subsidiary undertaking' of the Corporation, or that the Corporation is a 'parent undertaking', 'participating undertaking', or 'insurance holding company' as any of those terms are defined in *ibid.*, §1 (*q.v.* for definitions).

¹¹⁹ *Viz.*, First Non-Life Directive and First Life Directive; *cf.* Insurance Accounts Directive.

¹²⁰ See FSA Glossary, definition of "Society".

¹²¹ See for example Lloyd's Act 1871, ss.10, 11, 20, 24, 31, 32, 36, 40; Lloyd's Act 1911, recitals [2], [4], [5], [6], [7], ss.3, 4 and 7; Lloyd's Act 1982, ss.3(2), 6(1), 6(4), 14(2)(a)(i); Sch. 1; see also the definition of "the Society" at Lloyd's Act 1982, s.14(6).

¹²² See for example emanations of self-regulators-at-Lloyd's, *passim*.

¹²³ For: (1) legislative conceptual and other error see Insurance Premium Tax Regulations 1994 (1994 SI 1774), §2(1) ("In these Regulations ... "Lloyd's" means the society incorporated by section 3 of Lloyd's Act 1871"); (2) judicial error, see for example *Lloyd's v Fraser* [1999] Lloyd's Rep. I&R 156, 158 (Hobhouse LJ; "[I]t must be accepted that it is of importance to the Society that it should recover the sums which it says are owing to it"); (3) self-regulatory error, see for example Byelaw 20 of 1998, §2(5) ("The Society may provide any service ..." — a perfect illustration of the "Society"- "Corporation" canard). Recently, see for example *Brokers: Nat. Reg. Handbook 1998*, p.1 ("the interests of policyholders, the Society, *its* members ..."); italics added; Corporation RA fye December 31, 1999, p.36 ("The Society's financial position continues to improve. ... The accounts show an operating deficit of £9m" — clearly referring to the accounts and deficit of the Corporation, as confirmed at *ibid.*, p.44 (the Corporation's "Consolidated revenue account"); (4) other error, see for example April 10, 1997 letter from DTT's Insurance Directorate to personal representatives of deceased Members ("You may be aware that the Department has introduced arrangements to regulate members of Lloyd's who leave the Society after reinsuring their underwriting liabilities with Equitas").

¹²⁴ For legislative use, see for example Lloyd's Act 1871, s.24 ("The Society from time to time, by resolution of a general meeting...", clearly an error for "members of the Society", a phrase that the draftsman does use at *ibid.*, ss.10, 11, 20, 24, 31, 32, 36 and 40) and s.26 ("Byelaws made by the Society ..."; ditto) (both repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch 3). Significantly, "Society" was not used in any R&R Contract to describe Members collectively, but it was so used in S&M, §40 (p.14; 'What Lloyd's is ... trying to achieve through R&R is the opportunity for Names to buy a more limited form of "finality" through reinsurance into Equitas, and to make the price of that more affordable by redistributing to some extent the losses across the Society as a whole ...').

¹²⁵ See for example *Proposals to revise the solvency test applying to Lloyd's* (FSA, December 1999), §4 (p.1): 'While the Directive [First Non-Life Directive] generally refers to insurers, a reference made to Lloyd's is a reference to the Society as a whole (ie, "the association of underwriters known as Lloyd's").'

not readily discernible.¹²⁶ It is used in FSMA 2000,¹²⁷ FSA Glossary and Regulated Activities Order¹²⁸ (the latter adopting¹²⁹ the Lloyd's Act 1982, s.2(1) definition¹³⁰) to mean the Corporation. The use is misconceived because the Corporation is not a society and its correct legal name¹³¹ does not include the word 'society'. The FSA's phrase 'Society as a whole'¹³² is particularly curious;¹³³

(2) "Society of Lloyd's" to describe self-regulators-at-Lloyd's,¹³⁴ the Corporation,¹³⁵ and¹³⁶ or Members¹³⁷ collectively,¹³⁸ or sometimes, apparently, nothing readily discernible.¹³⁹ The bogus phrase (there is no relevant legal entity properly so called),

¹²⁶ As at Lloyd's Act 1871, Schedule ("The Fundamental Rules of the Society"), which are not rules concerning the Corporation, to which extent "Society" is used inconsistently; *SOD*, p.135 ("put the Society into run-off"); the various uses of "best interests of the Society".

¹²⁷ See FSMA 2000, s.315; and see the definition at *ibid.*, s.324(2) read with Lloyd's Act 1982, s.2(1) (definition of 'the Society').

¹²⁸ See Regulated Activities Order, §13(1)(a)(i).

¹²⁹ See Regulated Activities Order, §13(2).

¹³⁰ Lloyd's Act 1982, s.2(1): "'the Society" means the society incorporated by the Act of 1871 by the name of Lloyd's'.

¹³¹ See Lloyd's Act 1871, s.3.

¹³² At (for example) CP 16 solvency, §4 ('the Society as a whole'). And see LLD, §11.1.3G ("Lloyd's as a whole", suggesting that "Society" is used in CP 16 solvency, §4 to mean Members collectively).

¹³³ Because Members collectively are not synonymous with the Corporation and in the key concept is SYA participation, not Membership (the latter raises wholly different and separate General Undertaking- / MA 1-based issues). The FSA's compound terminological and conceptual confusion is perfectly illustrated at CP 16 solvency, §4 ("While the [First Non-Life] Directive generally refers to *insurers*, a reference made to Lloyd's is a reference to the Society as a whole (ie, "the association of underwriters known as Lloyd's"). Thus while the Member is legally the insurer, the solvency tests prescribed by the Directive apply to Lloyd's in the aggregate rather than to Members individually."; original italics).

¹³⁴ For judicial mis-use, see *Lloyd's v Leighs* [1997] CLC 1398, 1399 (CA; "challenges to the legitimacy of acts of the Society of Lloyd's"); *McAleer v Smith* 791 F. Supp. 923, 931 ("The Society of Lloyd's, as it is properly called ...").

¹³⁵ For use in: (1) litigation, see recently for example *Society of Lloyd's v Jaffray* {1a} [1999] Lloyd's Rep. I&R 182 (Colman J); *Garrow v Society of Lloyd's* [2000] Lloyd's Rep. IR 38 (CA), *ibid.*, [1999] Lloyd's Rep. IR 482 (Jacob J); *McAllister v Society of Lloyd's* [1999] Lloyd's Rep. IR 487 (Carnwath J). The Corporation sues using the fictitious name "Society of Lloyd's": see for example Corporation RA fye December 31, 1999, p.36 ("... the ongoing legal costs of defending the Society against litigation and pursuing debt recovery"); (2) official documents: see the comprehensive confusion in numerous of the Corporation's subsidiaries' annual accounts and 363s annual returns. The inconsistency appears to be merely careless rather than political. See similarly for example *Feigin v Lloyd's*, Civil Action No. 96-Z-98, Memorandum of law in support of defendant Lloyd's motion to dismiss, April 10, 1996, p.1 ("Defendant the Corporation of Lloyd's, also known as the Society of Lloyd's ..."); (3) internal self-regulatory instruments, see for example General Undertaking (heading, §(2)); Byelaw 13 of 1987, Sch 1 (definition of "the Society"); (4) Corporation documentation, see for example Corporation RA fye (for example) December 31, 1996 etc., Chairman's statement, *passim*. For legislative mis-use, see for example Financial Services Act 1986, s.42. For mis-use in a recent reinsurance treatise, see for example P.T. O'Neill and J.W. Wolonicki, *The Law of Reinsurance in England and Bermuda* (Sweet & Maxwell, 1998), §2-08 (p.34).

¹³⁶ See for example GR 1996, p.20-1 ("Security underlying policies issued at Lloyd's: financial data as at 31 December 1996", Part IV ("Total net resources of the Society of Lloyd's"). See also apparently *Kent RC*, p.39 (terms of reference).

¹³⁷ Query whether Members are even entitled to exercise the powers of the Corporation. Self-regulators-at-Lloyd's have been known to dispute the principle that resolutions adopted in Corporation general meeting bind the Council: see Council literature at the time of the 1992 and 1993 hostile Corporation EGMs organised by the so-called EGM Initiative. Since, Members have adopted resolutions in Corporation EGM favourable to the agenda of the Council, which of course accepted them as being authoritative.

¹³⁸ See for example *S&M*, §65 (p.23; "The Society of Lloyd's has to pass two different solvency tests ...").

¹³⁹ For example, the objects of the recently formed Lloyd's Market Association include "to promote the interests of the Society of Lloyd's": the context does not assist as to what entity or thing is meant:

apparently an invention of self-regulators-at-Lloyd's,¹⁴⁰ is a particular favourite of the latter (who during R&R adopted¹⁴¹ the alternative phrase "society incorporated by Lloyd's Act 1871 by the name of Lloyd's"), including insistently to mis-name the Corporation for purposes of litigation. The term has now infiltrated statutes¹⁴² and FSA regulation, in which latter it is used without¹⁴³ definition;

(3) "Corporation of Lloyd's" to describe the Corporation¹⁴⁴ and things not readily discernible;¹⁴⁵

(4) "Society and Corporation of Lloyd's" apparently to describe Members and the Corporation respectively,¹⁴⁶ or, in a similar form, apparently for an apparently fantastic body;¹⁴⁷

(5) the recent innovation "Society incorporated by Lloyd's Act 1871 by the name of Lloyd's".¹⁴⁸

further discussion

- 2.17 All the foregoing appellations, designations and abbreviations — which cause¹⁴⁹ much confusion and misunderstanding, including in litigation¹⁵⁰ — are multiply

<http://www.lloydsfondon.co.uk/directory/associations/body.htm> (August 8, 1999). And see recently *Reg. Plan 1999*, p.10.

¹⁴⁰ The Author recalls meeting with certain senior Corporation officials who readily conceded, amusedly, that the terms "Corporation of Lloyd's" and "Society of Lloyd's" had been devised "for political purposes".

¹⁴¹ See relevant RRCs.

¹⁴² See for example FSMA 2000, s.315.

¹⁴³ As not defined, though italicised, in FSA Glossary (at definition of "authorised person", §(f)). And used at IPRU(INS), §1.2 and *ibid.*, §9.38 header, but not defined in *ibid.*, §11.1.

¹⁴⁴ See for example Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993 (1993 SI 3245), Reg. 4(4)(b)(ii) ("the net assets of the Corporation of Lloyd's"); Insurance Accounts Directive, Annex, §B.3(b)2; *McAlee v. John Does 1-10* 9500116 1996 Mass. Super. LEXIS 350 (1996) *4, an error apparently taken from an "uncontroverted" affidavit filed in the case on behalf of the Corporation. And see *One Lime Street*, November 1993, p.28; *S&M*, §31 (p.9-10). For egregious error, see Lloyd's of London Limited (registered number 3189123), fye December 31, 1996, p.3 ("The company is a wholly owned subsidiary of the Corporation of Lloyd's which is incorporated ... under the Lloyd's Act 1871-1982"); *ibid.*, fye 31 December 1997, p.4; *ditto* in Lloyd's America Limited (registered number 3189026), RA fye December 1996 and fye December 1997.

¹⁴⁵ See for example *Encyclopedia Britannica* entry "Lloyd's of London" as at February 6, 2000 ("Lloyd's of London, formally Corporation Of Lloyd's, international insurance marketing association ...").

¹⁴⁶ See for example *In the Matter of Brooks and Dooley*, Case No. 8401/4, Decision of the Disciplinary Committee, §91(f); *RTFR*, §2.2 (p.25). The phrase is especially egregious given the unambiguous use of "Society" throughout Lloyd's Acts 1871-1982 to mean the Corporation.

¹⁴⁷ See for example Additional Securities RA fye December 31, 1999, p.1 ("Report of the directors 1999"):-

The Company is wholly owned by the Corporation of Lloyd's. Each member of the Society of Lloyd's enters into an agreement with the Company

¹⁴⁸ See for example RRCs 0, 1, 2, 3, 4, 8, 10, etc.; *B. S. Lyle Ltd. v Rosher* [1959] 1 W.L.R. 8, 10 (Lord Kilmuir LC).

¹⁴⁹ One proper approach in designating the Corporation, mindful of endemic colloquial error, would be "Lloyd's (the Lloyd's Act 1871, s.3 corporation)".

¹⁵⁰ See recently for example *McAlee v. John Does 1-10* 9500116 1996 Mass. Super. LEXIS 350 (1996) *5-6, n.6: 'None of the underwriters is a principal, agent or partner of the Society or the Corporation. ... The Society maintains that Macomber is not an agent for the Society (or, therefore, for the Corporation).' — apparently based an "uncontroverted" affidavit filed in the case on behalf of the Corporation: *ibid.*, *5. See similarly *Haynsworth and Leslie v Lloyd's* 121 F.3d 956 ("The Corporation of Lloyd's ... is also known as the Society of Lloyd's"). Plaintiffs are inconsistent, suing "the Society of Lloyd's", "the Corporation of Lloyd's", "the Society and Corporation of Lloyd's", "the Society and Council of Lloyd's", and — rarely and correctly — "Lloyd's".

spurious. For example: (1) number of bodies: "Society and Corporation" is erroneous: Lloyd's Act 1871, s.3 created only one¹⁵¹ corporate person. The formal distinction between a 'corporation' comprising bureaucrats and a 'society' comprising Members is particularly fanciful; (2) name of that one corporate person: the correct name of the corporation created by Lloyd's Act 1871, s.3 is Lloyd's¹⁵² *simpliciter* (not "Lloyd's Limited",¹⁵³ "Lloyd's Incorporated"¹⁵⁴ or similar). There is no relevant body whose legal name is "Society of Lloyd's", "Corporation of Lloyd's", "Society and Corporation of Lloyd's", "Society incorporated by Lloyd's Act 1871 by the name of Lloyd's",¹⁵⁵ or (discussed below) "Lloyd's of London". No such name is bestowed on any relevant person or thing by any relevant¹⁵⁶ part of Lloyd's Acts 1871-1982 or by any other legal document; (3) nature of that one corporate person: 'society' is misconceived.¹⁵⁷ The Corporation is sole owner of a currently dormant¹⁵⁸ English company called Lloyd's of London Limited,¹⁵⁹ apparently incorporated and retained solely to secure the name.¹⁶⁰ The phrase "Lloyd's of London"¹⁶¹ is a mere trademark.

¹⁵¹ *Viz.*, "... are hereby *united*..." (although nothing is actually being united) and "... shall be *one* body corporate". The contradiction "... are hereby *united* into a Society and Corporation" is corrected in all subsequent Lloyd's Acts ("Society *or* Corporation"): see for example Lloyd's Acts 1911, 1951 and 1982, first recitals: "[B]y Lloyd's Act 1871 ... certain persons were united into a Society *or* Corporation". And see "Establishment *or* Society" in the 1811 trust deed. Italics added. This is not the only possible legal configuration for a corporation: see for example the Mayor and Commonalty and Citizens of the City of London.

¹⁵² See Lloyd's Act 1871, s.3: "... hereby incorporated by the name of Lloyd's, and *by that name* shall be one body corporate ..." (italics added). And see Lloyd's Act 1911, first recital; Lloyd's Act 1951, first recital; Lloyd's Act 1982, recital, §(1). For correct legislative use, see for example Insurance Companies Act 1982, ss.2(2)(a), 15(4), 75, 78, 83(4), 83(6), 83(7), 84-86. On the use of the single word Lloyd's to describe the *former establishment or society* of Lloyd's, see, for example, Lloyd's Act 1871, long title and first recital. The argument that "Corporation of ..." is appropriate to distinguish the Corporation from Members collectively is similarly bogus.

¹⁵³ The Corporation does not trade with any form of limited liability.

¹⁵⁴ This would be a logical suffix but was not in use in 1871.

¹⁵⁵ Perhaps, as was judicially ventured in another context, "the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity": *Forestral Land, Timber and Railways Company, Ltd. v Rickards* (1940) 68 Lloyd's List Law Reports 45, 63 (MacKinnon LJ).

¹⁵⁶ Of the five phrases, only "Society of Lloyd's" actually appears in Lloyd's Acts 1871-1982 — *viz.*, Lloyd's Act 1871, recital [7]; s.2, and twice in s.42 — always to refer to the pre-Lloyd's Act 1871 *unincorporated* society. The word "Society" *simpliciter* is used throughout Lloyd's Acts 1871-1982 (starting with Lloyd's Act 1871, s.3) as a bizarre abbreviation for the Corporation.

¹⁵⁷ See ¶¶2.9, 2.11, 2.13.

¹⁵⁸ Lloyd's of London Limited (registered number 3189123) RA fye December 31, 1998, p.1 ("Activities"); *ibid.*, fye December 31, 1997, p.2 ("Principal Activities").

¹⁵⁹ Incorporated as Storetip Limited on April 22, 1996 (registered number 3189123); name changed to Lloyd's of London Limited on May 7, 1996. Simultaneously, company 3048034, incorporated by persons unconnected (so far as presently material) to the Corporation, changed its name from Lloyd's of London Limited to Storewarn Limited (in its turn, the original name of Lloyd's America Limited; registered number 3189026), and was dissolved by notice in the London Gazette of May 6, 1997.

¹⁶⁰ See Lloyd's of London Limited RA fpe December 31, 1996, p.1 ("Principal Activities"); "It was incorporated primarily for name protection purposes"; *ibid.*, RA fye December 31, 1997, p.2 ("Principal Activities"); *ibid.*, RA fye December 31, 1998, p.1 ("Activities"). "[I]ncorporated" is erroneous: the company was already incorporated by the name of Storetip Ltd. The name protection came not from incorporation but from the subsequent change of name. But see *Connecticut Bank & Trust Co. v Zering* File No. CV 14-628-0002 Circuit Court, Fourteenth Circuit 2 Conn. Cir. Ct. 333; 199 A.2d 18; 1963 Conn. Cir. LEXIS 268. 2 Conn. Cir. Ct. 333, 334; "Lloyds of London, Ltd., a foreign corporation licensed to do business in the state of Connecticut".

¹⁶¹ Extensively discussed at *Astor's Law of Lloyd's*, 2nd Ed.

*formal objects***generally**

- 2.18 Lloyd's Act 1911, s.4¹⁶² sets out the Corporation's¹⁶³ statutory¹⁶⁴ amended,¹⁶⁵ widely framed objects "in a manner analogous to the objects clause in the memorandum of a public company".¹⁶⁶ The objects merely delineate the Corporation's personal aspirations, not its express obligations.¹⁶⁷ None of its original¹⁶⁸ or amended objects confers on the Corporation any independent mission, trade or vocation of its own relating to insurance, trade, self-regulation or otherwise, or make the Corporation a trading vehicle for Members,¹⁶⁹ or authorise the Corporation to make Members its trading vehicles. The Corporation appears to be to some extent a hollow shell wholly subordinate to Members and their relevant business,¹⁷⁰ not unlike a trade association.¹⁷¹ The objects confer no express benefit directly on any assured-at-Lloyd's or the public at large (the Corporation is not constituted and does not exist for the public benefit). Self-regulators-at-Lloyd's are not and never have been under any express obligation directly to protect the interests of any assureds-at-Lloyd's (though they have occasionally asseverated that they have done so¹⁷²); *cf.* the FSA's

¹⁶² See Appendix II.

¹⁶³ The four objects set out in Lloyd's Act 1911, s.4 are those of, and only of, the Corporation, not of any other entity, person or body including Members collectively or any society, including whatever self-regulators mean by "Society of Lloyd's" to the extent they do not mean the Corporation, to which extent "the objects of the Society" is misconceived to the extent that the Lloyd's Act 1911, s.4 objects are meant. On 'objects of the Society', see for example *SOD*, p.151 ("[T]he principal purposes for which sums may be applied out of the New Central Fund will be extinguishing or reducing liabilities of members arising out of or in connection with their insurance business at Lloyd's and other purposes appearing to the Council to further the objects of the Society").

¹⁶⁴ Members have no power to amend any statute, including Lloyd's Act 1911, s.4. Any amendment of s.4 must be done constitutionally.

¹⁶⁵ Amended principally to enable the Corporation to support Members' insurance business of all types, not just marine. Original Lloyd's Act 1871, s.10, first object: "The carrying on of the business of marine insurance by members of the Society"; second original object: "The protection of the interests of members of the Society in respect of shipping and cargoes and freight"; third original object: "The collection, publication, and diffusion of intelligence and information with respect to shipping".

¹⁶⁶ *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 182 (QBD Div. Ct).

¹⁶⁷ See *Ashmore v Lloyd's* (No. 2) [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J):-

The first difficulty that the plaintiffs have to face is that the Statute [Lloyd's Act 1911, s.4] does not impose any express duty upon Lloyd's: it speaks only of "objects".

¹⁶⁸ See the original Lloyd's Act 1871. s.10 (repealed by and re-enacted in Lloyd's Act 1911, s.4).

¹⁶⁹ *R v Committee of Lloyd's, ex p. Posgate* (QBD; Divisional Court) *The Times*, January 12, 1983; *Financial Times*, January 14, 1983; LEXIS: the court was, therefore, presumably technically wrong in saying "The affairs of the Society plainly include the business of the Society, which is the business of insurance". The business of the Corporation is primarily the business of Members, which is insurance. None of its four objects envisages that the Corporation will enter into any insurance obligations.

¹⁷⁰ See *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Needham J):-

Although incorporated, [the Corporation] is a trade association, not fundamentally different from other trade or professional associations. It is the members who underwrite policies; it is the members who are liable to be sued on such policies.

And see *Thompson v Adams* (1889) 23 Q.B.D. 361; *Acme Wood Flooring Co. Ltd. v Marten* (1904) 20 T.L.R. 229. And see Lloyd's Act 1871, s.40 as amended by Lloyd's Act 1911, s.5.

¹⁷¹ See *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Needham J):-

Although incorporated, it is a trade association, not fundamentally different from other trade or professional associations.

¹⁷² See for example General Meeting of Members of Lloyd's, Wednesday 22nd June 1983, Statement by Sir Peter Green, Chairman, p.1 ("[T]he Society has scrupulously protected the interests of Lloyd's policy-holders"); *cf.* the Lloyd's enterprise's insolvency by early 1996.

insistent protestations of its own role¹⁷³ (as EU home state external insurance regulator).

the Council in relation to the Corporation's objects

- 2.19** Express *nexes* between the Corporation's statutory objects and the Council's statutory self-regulatory powers include: (1) Lloyd's Act 1982, s.6(1), requiring¹⁷⁴ the Council, to the extent that it happens to exercise Corporation powers¹⁷⁵ (which patently¹⁷⁶ do not include self-regulation), to do so in accordance with and subject to the provisions of Lloyd's Act 1911, s.4; (2) *ibid.*, s.6(2)(a), empowering¹⁷⁷ (not requiring¹⁷⁸) the Council, to the extent that it happens to promulgate byelaws, to make such byelaws (*cf.* other self-regulatory emissions) as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Act 1911, s.4 and specifically the furtherance of the objects set out therein.

assets

orientation

- 2.20** The Corporation's personal assets should be considered to be separate and distinct from the assets comprising any CU claims securitisation fund (arguably including the Central Fund¹⁷⁹). If the Central Fund is merely an undifferentiated part of the Corporation's personal assets, the various discretions at OCFB, §7 and NCFB, §8 are overridden by Lloyd's Act 1911, s.7 and other relevant statutory provisions.

Lloyd's Act 1911, s.7 required uses

- 2.21** The Corporation, expressly empowered to hold real and personal property,¹⁸⁰ is now¹⁸¹ required to hold its capital and income for all or any of the following purposes:-

(1) to further its statutory objects.¹⁸² Lloyd's Act 1911, s.4¹⁸³ sets out the Corporation's amended,¹⁸⁴ widely framed four objects 'in a manner analogous to the objects

¹⁷³ See ¶1.3.

¹⁷⁴ Lloyd's Act 1982, s.6(1) (italics added):-

The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder.

¹⁷⁵ See Lloyd's Act 1982, s.6(1).

¹⁷⁶ Because they are wholly absent from Lloyd's Acts 1871-1982 and elsewhere. All references in LLD, Ch. 1 to the Corporation as primary self-regulator are erroneous.

¹⁷⁷ See Lloyd's Act 1982, s.6(2).

¹⁷⁸ See *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J; 'The first difficulty that the plaintiffs have to face is that the Statute [Lloyd's Act 1911, s.4] does not impose any express duty upon Lloyd's: it speaks only of "objects"').

¹⁷⁹ Self-regulators-at-Lloyd's appear to consider that the Corporation owns the Central Fund. There is no correct legal basis for that view.

¹⁸⁰ Lloyd's Act 1871, s.4.

¹⁸¹ Until replaced by Lloyd's Act 1982, s.15(1)(b), Lloyd's Act 1911, s.7 prescribed — at a time when Members had exclusive byelaw-making power (see Lloyd's Act 1871, s.24; Members now have no primary (*cf.* Lloyd's Act 1982, s.6(4)) byelaw-making power at all: see Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch 3 (which repealed Lloyd's Act 1871, s.24) and *ibid.*, s.6(2) (exclusively empowering the Council to promulgate byelaws)) — that the Corporation hold its capital and income: (1) to defray its and the Old Committee's costs, charges and expenses; (2) 'or otherwise in the execution and carrying out of Lloyd's Acts 1871 to 1911 and otherwise in furthering the objects of the Society and for such other purposes (if any) as may be prescribed by any bye-laws of the Society and subject thereto for the benefit of the Members of Lloyd's jointly.'

clause in the memorandum of a public company'.¹⁸⁵ The objects are those of, and only of, the Corporation, not of any other entity, person or body including Members collectively or any society, including whatever self-regulators mean by "Society of Lloyd's" to the extent they do not mean the Corporation, to which extent "the objects of the Society"¹⁸⁶ is misconceived to the extent that the Lloyd's Act 1911, s.4 objects are meant. The objects merely delineate the Corporation's personal aspirations, not impose express obligations.¹⁸⁷ None of its original¹⁸⁸ or amended objects confers on the Corporation any independent mission, trade or vocation of its own relating to insurance, trade, self-regulation or otherwise, or make the Corporation a trading vehicle for Members.¹⁸⁹ The Corporation appears to be to some extent a hollow shell wholly subordinate to Members and their relevant business,¹⁹⁰ not unlike a trade association.¹⁹¹ The objects confer no express benefit directly on any assured-at-Lloyd's or the public at large;

(2) to defray the costs, charges and expenses incurred by it, the Council, or otherwise in carrying out Lloyd's Acts 1871-1982.¹⁹² The Council has no discretion, or other privilege, to not use Corporation assets to pay the Corporation's personal liabilities (*cf.* for other purposes, including to pay or not pay SYA participants' liabilities);

(3) for such other purposes (if any) as may from time to time be prescribed by byelaw.¹⁹³

¹⁸² Lloyd's Act 1911, s.7(b), as substituted by Lloyd's Act 1982, s.15(1)(b).

¹⁸³ See Appendix II.

¹⁸⁴ Amended principally to enable the Corporation to support Members' insurance business of all types, not just marine. Original Lloyd's Act 1871, s.10, first object: "The carrying on of the business of marine insurance by members of the Society"; second original object: "The protection of the interests of members of the Society in respect of shipping and cargoes and freight"; third original object: "The collection, publication, and diffusion of intelligence and information with respect to shipping".

¹⁸⁵ *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 182 (QBD Div. Ct.).

¹⁸⁶ See for example *SOD*, p.151 ("[T]he principal purposes for which sums may be applied out of the New Central Fund will be extinguishing or reducing liabilities of members arising out of or in connection with their insurance business at Lloyd's and other purposes appearing to the Council to further the objects of the Society").

¹⁸⁷ See *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620, 632 (Gatehouse J).

¹⁸⁸ See the original Lloyd's Act 1871, s.10 (repealed by and re-enacted in Lloyd's Act 1911, s.4).

¹⁸⁹ *R v Committee of Lloyd's, ex p. Posgate* (QBD; Divisional Court) *The Times*, January 12, 1983; *Financial Times*, January 14, 1983; LEXIS: the court was, therefore, presumably technically wrong in saying "The affairs of the Society plainly include the business of the Society, which is the business of insurance". The business of the Corporation plainly include the business of Members, which is insurance. None of its four objects envisages that the Corporation will enter into any insurance obligations.

¹⁹⁰ See *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Needham J):-

Although incorporated, [the Corporation] is a trade association, not fundamentally different from other trade or professional associations. It is the members who underwrite policies; it is the members who are liable to be sued on such policies.

And see *Thompson v Adams* (1889) 23 Q.B.D. 361; *Acme Wood Flooring Co. Ltd. v Marten* (1904) 20 T.L.R. 229. And see Lloyd's Act 1871, s.40 as amended by Lloyd's Act 1911, s.5.

¹⁹¹ See *Scott v Tuff-Kote (Australia) Pty. Ltd.* [1976] 2 Lloyd's Rep. 103, 107 (Needham J):-

Although incorporated, it is a trade association, not fundamentally different from other trade or professional associations.

¹⁹² Lloyd's Act 1911, s.7(a), as substituted by Lloyd's Act 1982, s.15(1)(b).

¹⁹³ Lloyd's Act 1911, s.7(e), as substituted by Lloyd's Act 1982, s.15(1)(b).

- 2.22 After these and the statutory discretionary uses (see below), the Corporation is required to hold its property for the benefit of Members jointly.¹⁹⁴

Lloyd's Act 1911, s.7 discretionary uses

- 2.23 The Corporation is required to hold its capital and income:-

(1) to make good¹⁹⁵ any default by any Member¹⁹⁶ under any insurance contract (but presumably no other¹⁹⁷ sort of contract) underwritten at Lloyd's which "in the Council's opinion"¹⁹⁸ it is in Members' interests to make good.¹⁹⁹ The Council itself takes a similar approach in OCFB.²⁰⁰ The provision, resembling that promulgated by the Council in relation to its disbursement of the Central Fund,²⁰¹ does not distinguish²⁰² between any assured-at-Lloyd's, any SYA participant or any insurance product (or anything else). The Corporation's personal assets have rarely been used to pay insurance liabilities: some such assets were injected into Equitas Re as part

¹⁹⁴ Lloyd's Act 1911, s.7, as substituted by Lloyd's Act 1982, s.15(1)(b). The original 1811 trust deed provided that the Establishment's property was held on trust for the Establishment's members as a whole.

¹⁹⁵ See Lloyd's Act 1911, s.7: "The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes:— ... (c) for making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's which in the opinion of the Council it is in the interests of the members of the Society to make good ...".

¹⁹⁶ The provision presumably intends to refer to default not by a Member in relation to a Member-level CU-fund contribution, but by a SYA participant, at SYA level, under an insurance contract of which he is either the *originalis* or (further to relevant SAA provisions: see this work, Appendix I, on how conventional RTC infiltrates the inward-RTCd liability into the accounts of the conventional inward-RTCing SYA participant(s), and extricates the conventionally outward-RTCd SYA participant from that liability) the or a conventional inward-RTCing SYA participant.

¹⁹⁷ Including, presumably, the array of BO contracts including (at Member level) General Undertaking / MA 1, and (at SYA level) SUA 1 / SCA 1, and PTD-premium.

¹⁹⁸ It is difficult to imagine the Council, which the Lloyd's enterprise purports to be solvent and conducts business as usual, deciding to invoke its Lloyd's Act 1911, s.7 discretion not to use Corporation personal assets (assuming in the first place that the overall position had deteriorated to the extent that they were material in the first place) pay an insurance liability (akin to its decision to invoke its *ibid.*, s.9 discretion not to honour a Corporation guarantee). Absent CU funds but the Corporation owning substantial assets, those assets presumably could not — regardless of the Council's opinion — properly be distributed to Members severally gross of the totality of SYA participants' outstanding insurance liabilities: there would presumably be no judicial hesitation that the Corporation's first and or second Lloyd's Act 1911, s.4 objects required that property to be used to pay assureds-at-Lloyd's, not (for example) to make a post-liquidation distribution to Members net only of the Corporation's own immediately apparent personal liabilities.

¹⁹⁹ Lloyd's Act 1911, s.7(c), as substituted by Lloyd's Act 1982, s.15(1)(b).

²⁰⁰ OCFB, §8 ("Application of other funds or property of the Society"):-

Monies out of the funds or property of the Society other than the Central Fund may be applied and such funds or property may be charged for any of the following purposes: (a) making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's; (b) preventing the occurrences or reducing the extent of such default by any member of the Society; (c) compensating in whole or in part any person for making for or on behalf of any member of the Society any payment which has had the effect of preventing or reducing such defaults by any such member; (d) extinguishing or reducing the liability of any member of the Society to any person whatsoever, whether or not arising under a contract of insurance where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

²⁰¹ See for example OCFB, §7; NCFB, §8.

²⁰² In *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), the judge held that not all insurance liabilities necessarily did fall on the then Lloyd's enterprise. *Ibid.*, 83:-

[I]t is ... wholly impossible to hold that a person who conspires with another to conceal from the Committee of Lloyd's the transactions of that other can possibly be held entitled, after continuing as he knows without the consent of Lloyd's and against their will if they knew the facts, and having increased his liabilities, to expect the Committee of Lloyd's to be responsible for them.

of R&R.²⁰³ Query in what circumstances, of proper or rogue²⁰⁴ active underwriting, the Council could properly exercise its discretion other than in so making good;

(2) to guarantee²⁰⁵ or secure, 'in such manner as the Council think fit', any debt or obligation of or binding on the Corporation, any of its subsidiaries, or any other person.²⁰⁶ The Corporation does enter into a number of guarantees²⁰⁷ to third parties.

As between the Council and Members — a mere BO matter — the Council's deployment of Corporation personal assets may well have a discretionary component founded in Lloyd's Act 1911, s.7(c). That or any other similar contractual discretion has nothing, however, to do, and does not empower the Council to interfere, with such FO matters as (for example) a third party's rights against the Corporation's personal assets.²⁰⁸

appropriation mechanism

- 2.24** Whereas the procedure for appropriating Central Fund assets in order to discharge SYA participants' relevant defaults is well established,²⁰⁹ there appears to be no equivalent mechanism for appropriating or reimbursing the Corporation's (other) personal funds. The Council may vote Corporation money for purposes other than those of the Corporation's business, but every such vote in excess of £10,000 must be reported in the Corporation's annual accounts.²¹⁰ The free availability, to the extent stated above, of the Corporation's personal assets is entirely separate from Lloyd's Act 1982, s.14's narrow restriction in relation to litigation damages. The powers are unclear of Members in Corporation general meeting to countermand the Council's decisions on how the Council and or Corporation spends or does not spend the Corporation's money.
- 2.25** To the extent that the Corporation may happen to contribute to the insurance liabilities of a SYA participant, and whereas appropriation of Central Fund assets to discharge SYA participants' PTF-premium liabilities is ordinarily a loan repayable on demand by the Member via the Corporation,²¹¹ there appears to be no equivalent mechanism for appropriating or reimbursing Corporation personal funds²¹² (*cf.* for requiring Members to contribute to the Corporation's (other) personal assets).

²⁰³ See the summary at *SOD*, p.34-36 ("Lloyd's Contribution" — the implication there that the Corporation's personal assets include Central Fund assets is misconceived).

²⁰⁴ See the PCW affair (1985-6; SYA 9001-1986, Lioncover Ltd., the PCW settlements, etc.) and the Council's insistence that all relevant insurance liabilities be paid in full as and when they fell due.

²⁰⁵ See Lloyd's Act 1911, s.7: "The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes:— ... (d) for guaranteeing or securing, in such manner as the Council think fit, any debt or obligation of or binding on the Society, any of its subsidiaries or any other person ...".

²⁰⁶ Lloyd's Act 1911, s.7(d), as substituted by Lloyd's Act 1982, s.15(1)(b); and see But see Lloyd's Act 1911, sixth recital.

²⁰⁷ Beyond this work's scope. The most obvious relate to Centrewrite and Lioncover. Summaries can be found at Corporation RAs.

²⁰⁸ For example, Lloyd's Act 1911, s.7(c) plainly provides no basis on which the Council could properly withhold Corporation assets from a judgment creditor of the Corporation.

²⁰⁹ See for example OCFB, §10(1) *et seq.*; NCFB, §11(1) *et seq.*

²¹⁰ Byelaw 15 of 1983, §6.

²¹¹ See OCFB, §10(1) *et seq.*; NCFB, §11(1) *et seq.*

²¹² But see provisions such as Byelaw 4 of 1986, §10(1)(b).

2.26 The Corporation is statutorily empowered to use its own personal assets to pay off a SYA participant's insurance defaults if the Council opines that it is in the interests of 'the Society' for it to do so.²¹³ This is similar to the Council's discretion in relation to the Central Fund,²¹⁴ and can be disposed of with the same reasoning. Query if there could exist any particular or category of valid insurance claim that the Council could in good faith adjudge should not in principle be discharged from the Corporation's assets.

2.27 The Corporation's inherent obligation to part with its own money to discharge its own liabilities must be distinguished from the Council's express statutory²¹⁵ discretion to give away the Corporation's property (and has given itself a byelaw²¹⁶ discretion to give away the Central Fund) to pay the insurance liabilities of SYA participants, not to pay insurance liabilities transferred to or assumed by the Corporation.

culpable third parties

2.28 Post-Equitable Life, Barings and Enron, the Corporation's insolvency guardian will presumably wish to identify and pursue relevant actionable misconduct by (for example): (1) Council members,²¹⁷ who may be somewhat analogised²¹⁸ to (but who are not) company directors, including for purposes of misfeasance and fraudulent trading;²¹⁹ (2) the Corporation's auditors²²⁰ (presumably critically supervised by the Council's Audit Committee²²¹), who report²²² to and are appointed by such Members as choose to vote in Corporation AGM.

liabilities generally orientation

2.29 The Corporation trades, as does a SYA participant, with limited assets on the one hand and, on the other, no structural limitation on the quantity of liability it is capable of assuming. The Corporation's legal and financial liability is nowhere — including in its constitution, Lloyd's Acts 1871-1982 — expressed to be limited or

²¹³ Lloyd's Act 1911, s.7(c), as substituted by Lloyd's Act 1982, s.15(1)(b).

²¹⁴ See OCFB, §7; NCFB, §8.

²¹⁵ See Lloyd's Act 1911, s.7(c).

²¹⁶ See OCFB, §7; NCFB, §8 and *ibid.*'s exceptions.

²¹⁷ See generally Lloyd's Act 1982, ss.3, 13, etc.

²¹⁸ See for example Lloyd's Act 1982, s.13. The Council likens management of the Corporation to management of a company: see for example Corporation RA fye December 31, 2002, p.61 ('Report of the Nominations, Appointments and Compensation Committee'; reference to the Combined Code; presumably the updated (post-Higgs, Smith, etc.) July 23, 2003 Combined Code will be adopted in relation to the Corporation's next accounting period). A discussion of Council members is at *Astor's Law of Lloyd's*, 2nd Ed.

²¹⁹ See generally Companies Act 1985, s.458; Insolvency Act 1986, s.213 (see *ibid.*, s.212 (misfeasance) and *ibid.*, s.214 (wrongful trading)) — at least (analogously) in relation to the Corporation's personal trading; query whether also in relation to the Lloyd's enterprise's insurance trading.

²²⁰ See DTI consultation paper, December 2003, on directors' and auditors' liability. See generally recently *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114, [2003] 2 BCLC 603 (CA; Equitable Life); *Barings plc v Coopers & Lybrand* [2003] Lloyd's Rep. IR 566; 2003 EWHC 1319 Ch (Evans-Lombe J; Barings). And see *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney (No. 2)* {3} [1997] LRLR 247, 257 (Cresswell J).

²²¹ See Corporation RA fye December 31, 2002, p.60 (Audit Committee members are listed at *ibid.*, p.62).

²²² See for example Corporation RA fye December 31, 2002, p.64 ('Independent auditor's report to the members of Lloyd's').

unlimited.²²³ Nothing in that constitution limits the extent to which its necessarily limited assets are exposed to having to pay its debts.

not a repository of Members' capital

- 2.30** The Corporation presently has no capital structure, does not offer for sale or sell any shares or investment product relating to itself to Members,²²⁴ and is in no way or sense a repository of Members' or other capital; nor is there any legal or other mechanism enabling a Member to otherwise invest²²⁵ in it, or financially contribute to its assets or liabilities in the expectation of a return from its activities. Members never do receive any²²⁶ return from it, the Corporation never distributing in any form (including dividends, bonuses, etc.) Corporation surpluses, Central Fund surpluses, or other capital-related sums to Members or anyone else. Genuine and (in the case of deliberate, negligent or inadvertent under-reserving) false profit (long regulatorily unobjectionable²²⁷) from SYA-level insurance activities is generated at SYA level (never at syndicate level) and distributed²²⁸ to SYA participants; profit commission is likewise distributed to members' and managing agencies.

contributories

- 2.31** The Corporation's principal contributories appear to be current (query also past) Members, notwithstanding that no Member is expressly²²⁹ required to fund any of its liabilities, whether or not in an insolvency; nor has the Council empowered itself to make calls on any category of Member to fund any Corporation personal liability; nor does any Member provide any BO or MO, PU or CU funds specifically for

²²³ On unlimited-liability insurance enterprises (which begs the question in relation to the Corporation), see recently *Unlimited Insurance companies — A consultation document* (Treasury, April 2004).

²²⁴ The Corporation does issue securities (guarantees, bonds), but not to Members or SYA participants. It is arguable that a Member has a financial interest in those securities: their existence (whether or not called) enables him to trade in the relevant jurisdictions. For multiple error, see February 28, 1996 press release quoting Missouri Secretary of State Rebecca McDowell Cook:-

This large and prestigious company clearly took advantage of Missouri investors by leading them to believe that it was on sound financial footing and that over a period of time sustained losses could never occur[...] But the fact is, Lloyd's was using money from American investors to covert tremendous insurance liabilities it had incurred.

²²⁵ The notion of investing "in Lloyd's" (or in 'syndicates') is multiply misconceived. Historically, see for example *Cromer WP*, §193 (p.41). The error was frequently made in US state securities proceedings against the Corporation before R&R: see for example Kennedy, Circuit Judge in *West Shell Jr. et al v R.W. Sturge Ltd et al*. US Court of Appeals for the Sixth Circuit 1995 Fed. App. 0176P (6th Cir.) No. 94-3119; judgment of June 8, 1995, multiply describing the plaintiffs as "investors in the Society of Lloyd's". And see for example *In the Matter of Lloyd's of London*, State of West Virginia, West Virginia Securities Division, Summary Notice to Cease and Desist and Notice of Right to Hearing, Case No. E95-0846, January 22, 1996, Findings of Fact, §3: "A member's interest at Lloyd's is known as a membership".

²²⁶ There are two principal events in which Members might receive money from the Corporation, viz., damages where the Lloyd's Act 1982, s.14 exemption is held not to apply, and where there is a net surplus on the Corporation's winding up.

²²⁷ Recalling *Penrose*, 552 ("There was no requirement to set up reserves for terminal bonus. It could properly be accounted for on a cash basis. ... the key consideration for the Society was the most appropriate way to pass on 'asset shares' to policyholders.").

²²⁸ Recalling *Penrose*, 566: 'The Society's bonus system seemed complex and even more difficult for policyholders to understand than that of most companies, but the official view was that there was nothing "inherently unsound" about it.'

²²⁹ A Member's annual subscription is not self-regulatorily expressed to be a contribution towards the Corporation's debts.

that purpose. Members have the usual rights of members of a corporation, including (for example) to inspect its books of account.²³⁰

power to borrow

- 2.32** The Corporation is expressly empowered to raise and borrow money and secure the same on its property in order to acquire any land or turn it to account, or for any other Corporation purpose.²³¹ Query whether borrowing to fund the otherwise insolvent Central Fund or the several insurance businesses of otherwise insolvent individual Members is a proper purpose, even if external-regulatorily permitted;

liability for insurance sold at Lloyd's

statutory objects

- 2.33** The Corporation's (original²³² and current²³³) statutory objects²³⁴ do not contemplate it selling insurance, and it has no statutory power to do so.²³⁵

orientation; statutory objects; Lloyd's Act 1982, s.14

- 2.34** Mention of the financial interests of any assured-at-Lloyd's is conspicuously absent from Lloyd's Acts 1871-1982, including in the Corporation's Lloyd's Act 1911, s.4 objects, especially the second 'advancement and protection' object: advancing and protecting assureds'-at-Lloyd's interests has been largely for external insurance regulators (not does it mention advancing or protecting the personal financial interests of Members). Lloyd's Acts 1871-1982, private Acts akin²³⁶ to a memorandum and articles of association, are principally of BO effect and do not bind third parties outside the Corporation's purview or the Council's self-regulatory jurisdiction, including assureds-at-Lloyd's. Lloyd's Act 1871, ninth unnumbered recital²³⁷ hints aconclusively that a reason for creating the Corporation — in the days before conduit-accessed MO and BO trust funds — was to provide recourse for assureds-at-Lloyd's where the *originalis* could not practicably be found. There appears to be no Rulebook-at-Lloyd's provision requiring the Council or Corporation to hold or apply any part of the Corporation's unencumbered personal assets to directly or indirectly discharge any insurance liability, whether on an available or unavailable SYA participant's default or otherwise. The Council has used the Corporation's personal assets to make payments to Members and others. Were not-BBSN circumstances to prevail at Lloyd's, and absent either clear law exonerating it or a radical

²³⁰ See *Finch v Bishop of Ely* (1828) 2 Man. & Ry. 127, 129 (Lord Tenterden CJ). The Corporation's accounts are presented annually to the Members at the Corporation AGM.

²³¹ Lloyd's Act 1951, s.3(1). The Corporation may in particular alter, construct, decorate, fit up, furnish, improve, maintain, pull down and reconstruct buildings, whether intended for occupation wholly or partly by it or its members or subscribers or otherwise: *ibid.* It is not clear whether these particular powers are exercisable only in the context of the main s.3 power or in any event. For the Corporation to become a mere property developer would presumably be outside even a liberal construction of its Lloyd's Act 1911, s.4 objects.

²³² See original Lloyd's Act 1871, s.10, repealed by Lloyd's Act 1911, s.4.

²³³ See Lloyd's Act 1911, s.4.

²³⁴ See ¶2.18.

²³⁵ To which extent Lloyd's Act 1871, s.40 did not need to elaborate the converse, *viz.*, that the Corporation is not personally liable (in the FO or BO) for SYA participants' insurance debts, either before or after exhaustion of relevant PU and CU funds.

²³⁶ See *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 182 (QBD Divisional Court).

²³⁷ 'And whereas, by reason of the mode in which the business of insurance has always been carried on by members of the Society, the names of those who underwrite a particular policy cannot, when a considerable time has elapsed, be traced with certainty, if at all'

reconfiguration of the Lloyd's enterprise, the Corporation,²³⁸ having blandished 'collective security of a corporate body',²³⁹ may face collection, bad-faith claims handling²⁴⁰ and other suits by unpaid valid²⁴¹-claimant assureds-at-Lloyd's, possibly in considerable numbers. Bases in English law for such claims are presently unclear. The Corporation has²⁴² a limited exemption (mischaracterised as an immunity) from having to pay damages to (among others) Members. The Corporation has no such (or any other) exemption from having to pay damages, whether or not in relation to actionable misconduct adjudged fraudulent,²⁴³ to any successful claimant outside Lloyd's Act 1982, s.14(2), including an assured-at-Lloyd's.²⁴⁴ English²⁴⁵ courts appear to have striven to protect the Corporation from liability and discredit.

FO liability to the assured-at-Lloyd's contractually

- 2.35** In the FO, the Corporation does not²⁴⁶ as a principal enter into any express primary or collateral insurance contract with any assured-at-Lloyd's (including, perhaps by affixing its seal to a Lloyd's policy) to which limited extent Scrutton LJ²⁴⁷ was cor-

²³⁸ Historically, pre-incorporation, see *Lloyd's v Harper* (1880) 16 Ch.D. 290, 303 (Fry J):-

[I]n the year 1863 Lloyd's was a voluntary society or club constituted under a deed of 1838, which referred to an earlier deed of 1811, and, according to the terms of that deed, each person who became a member of Lloyd's contracted to observe all the by-laws and regulations for the time being in force in respect of that society, and further contracted to indemnify the managing committee of the society against any loss they might incur in that capacity.

The judge may be referring to unnumbered seventh paragraph in the 1838 trust deed:-

Provided always, that if it shall at any time hereafter happen, that the whole of the funds, or monies vested or to be vested in the Trustees, shall be voted away by a majority of two General Meetings, or paid by the Trustees for the use, or by the direction of the Subscribers for the time being, or there shall be no sufficient funds remaining in the hands of the said Trustees, then and in either of such cases, the Subscribers do hereby severally and respectively covenant, promise, and agree, with the said Joseph Marryat, Horatio Clagett, Robert Shedden, and Joshua Reeve, to indemnify them, their executors, administrators, and successors, for the time being, against all loss, costs, and charges, they, or any of them, may be put unto for or by reason of their or either of their having entered into any contract, covenant, or agreement, or incurred any liability for the use, or by the authority of the said Society[.]

²³⁹ See incidentally *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J).

²⁴⁰ On the Corporation's role as claims handler, and provider of claims handling services, see *Astor's Law of Lloyd's*, 2nd Ed.

²⁴¹ The Corporation is not liable (if at all) to pay a false or fraudulent claim any more than is a SYA participant: *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J):-

Under these circumstances, it is to my mind wholly impossible to hold that a person who conspires with another to conceal from the Committee of Lloyd's the transactions of that other can possibly be held entitled, after continuing as he knows without the consent of Lloyd's and against their will if they knew the facts, and having increased his liabilities, to expect the Committee of Lloyd's to be responsible for them; and it is immaterial from that point of view what their offer was or what their promise was. No offer and no promise could cover such a case as that: it was in fact a fraud upon the Committee of Lloyd's.

²⁴² See Lloyd's Act 1982, s.14(3).

²⁴³ Cf. Lloyd's Act 1982, s.14(3)'s fraud exception in relation to suits brought by members of the *ibid.*, s.14(2)-defined "Lloyd's community".

²⁴⁴ Lloyd's Act 1982, s.14 does not apply to such suits.

²⁴⁵ See for example *Ashmore v Lloyd's* (No. 2) [1992] 2 Lloyd's Rep. 620 (Gatehouse J) (and see incidentally *ibid.* (No. 1) [1992] 2 Lloyd's Rep. 1 (HL)); *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.). (QB Div. Ct.); and see *ibid.*, unreported, May 22, 1992 (QB Div. Ct.); *Lloyd's v Jaffray* {2b} [2002] EWCA Civ. 1101 (CA) on appeal from *ibid.*, {2a} [2000] CLC 725 (Cresswell J).

²⁴⁶ The Corporation has emphasised that LPSO provides policy signing and issuing services as each SYA participant's agent, not as a principal: see (for example) 1974 LPSO Agreement.

²⁴⁷ *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports 98, 101 (Scrutton LJ):-

rect. Insurance is bought at Lloyd's, not from Lloyd's. Reported contract-based suits by assureds-at-Lloyd's alleging that the Corporation contracted to sell insurance or benefits collateral to insurance appear to be extremely rare.²⁴⁸ A SYA participant's default on a relevant insurance liability of itself presently appears to impose no express contractual liability on the Corporation.²⁴⁹ In *Industrial Guarantee Corporation v Lloyd's*,²⁵⁰ the judge did not need to, and did not, deal with the defendant Corporation's plea²⁵¹ (presumably solely in the contractual context) that the Lloyd's enterprise's blandishments were not an offer by the Corporation to the plaintiff assured-at-Lloyd's. The FSA has recently attempted²⁵² to impose an obligation in relation to the Central Fund.

personal securitisation function

- 2.36** The Corporation is particularly expressly²⁵³ empowered to guarantee, either by itself or jointly with any other guarantor(s), the payment of claims and demands on

[I]t cannot be too clearly understood by those who do not know anything about it that Lloyd's does not insure; Lloyd's as such never insures; the corporation never insures. ... Lloyd's insures nobody and takes no liability.

- ²⁴⁸ See for example *Industrial Guarantee Corporation v Lloyd's* [1924] 19 Ll.L.Rep.. 78 (Bailhache J), a breach of contract suit apparently formulated by three leading commercial barristers (Hogg QC, Simmons, Paull). *Per* the headnote:-

Plaintiffs claimed to have been induced to accept certain policies and letters of guarantee by reason of representations and warranties made by defendants in a document which they alleged was issued to them by the defendants called "The Story of Lloyd's" which constituted an offer accepted by the plaintiffs in that they took the policies and letters of guarantee. ... Plaintiffs averred that this document was an offer that if plaintiffs would enter into contracts with and accept insurance policies and letters of guarantee from Lloyd's underwriters the defendants would (a) pay the amount insured in case of default of the underwriters; (b) adopt the precautions and take the various measures set out in and implied by the said document; and that the defendants undertook and agreed that any liabilities under the policies would be discharged. Plaintiffs claimed to have accepted the alleged offer by entering into policies of insurance. Plaintiffs further alleged that defendants failed to make an effective compulsory audit of the underwriters and to take ample measures to provide for unexpected contingencies; and that defendants had collected the assets of the defaulting underwriters and held them in trust for plaintiffs and had failed to make distribution to plaintiffs. Plaintiffs claimed damages, a declaration that the defendants were liable to indemnify them, and that accounts should be taken to ascertain the liability of the defendants.

- ²⁴⁹ But see *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), quoting a promotional pamphlet issued by self-regulators at Lloyd's to prospective assureds, which stated in part:-

'It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world.'

The plaintiff pleaded that the pamphlet was an offer that, if the plaintiff bought insurance at Lloyd's, the Corporation would (among other things) take the measures concerning Members' liability and solvency set out in and implied in it, and pay the claim if the insurer Member defaulted. At *ibid.*, 82-3 (Bailhache J):-

If I had to consider this question: what meaning does the pamphlet issued by Lloyd's Committee convey to a person who knows nothing about the business of Lloyd's and is making up his mind whether he shall insure with Lloyd's or whether he shall insure with the companies[,] and if I were asked whether a person reading that pamphlet ... would reasonably suppose that the Committee of Lloyd's stated there and offered that if he would insure with Lloyd's the Corporation of Lloyd's would be answerable for his insurances, I should consider the question a question of very great difficulty, ... which would have to be decided, not on the one or two erroneous statements in it but upon what is the true effect of the whole pamphlet.

The judge found that the pamphlet, not dissimilar to ones recently issued by self-regulators at Lloyd's, contained false and misleading statements, some "which, I think, might be calculated to mislead": *ibid.*, 83. And see *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports, 98 (CA); *Portavon Cinema Co. Ltd. v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601.

- (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J)

- ²⁵¹ See at *loc. cit.*, 79.

- ²⁵² See LLD, §3.2.1G etc.

- ²⁵³ See Lloyd's Act 1911, s.9:-

insurance contracts underwritten by Members,²⁵⁴ for which purpose the Corporation may enter into relevant contracts,²⁵⁵ and may apply its own personal funds and property and the income therefrom.²⁵⁶ Such powers may be exercised by the Council in accordance with byelaws made under Lloyd's Act 1982.²⁵⁷ The repeated, routine exercise of this power is essential to securing the entitlement of Members to sell insurance in some jurisdictions.²⁵⁸ The Corporation has given various personal undertakings, indemnities and guarantees accordingly, including express indemnities to (for example) SYA participants' outward reinsurers Centrewrite²⁵⁹ and Lioncover.²⁶⁰ It appears to have given none to Equitas Re, appropriately since Equitas Re is a mere outward reinsurer. The Corporation does not give any guarantee direct to any assured-at-Lloyd's.

FO liability to the assured-at-Lloyd's more generally

- 2.37 Other than infiltration into the Corporation's personal account via external insurance regulation of the Central Fund (to the extent that the Central Fund is merely one of the Corporation's personal assets), the Corporation — which does not directly or expressly contract as an insurer or surety with any assured-at-Lloyd's — appears to be under no express general obligation to meet SYA participants' insurance liabilities. The same degree of remoteness appears to characterise Additional Securities Ltd.'s relationship with assureds-at-Lloyd's.

FO liability to the assured-at-Lloyd's for misleading blandishments

- 2.38 One recourse approach to the Corporation's personal assets (if any²⁶¹) would be for the EquitasRe-assured-at-Lloyd's to sue it for damages for inducing the underlying defaulted-on insurance contract by publishing to the assured-at-Lloyd's (especially the EquitasRe-assured-at-Lloyd's) various FO promotional²⁶² or other²⁶³ material

Without prejudice to the provisions of section 7 of this Act the Society may either by itself or jointly with any other guarantor or guarantors guarantee the payment of claims and demands upon contracts of insurance underwritten at Lloyd's and the Society may for such purposes enter into contracts and may apply the funds and property of the Society and the income therefrom or any part thereof for the purpose of discharging any liabilities of the Society under any guarantees or contracts as aforesaid and the powers conferred on the Society by this section may be exercised by the Council in accordance with byelaws made under Lloyd's Act, 1982.

²⁵⁴ see Lloyd's Act 1911, s.9 as substituted by Lloyd's Act 1982, s.15(1)(c). And see *ibid.*, s.7. For a US analogy, see for example *Dussault v Geldermann & Co.* 1975-6 Trade Cas (CCH) ¶60,502 (D. Utah September 3, 1975).

²⁵⁵ Lloyd's Act 1911, s.9 as substituted by Lloyd's Act 1982, s.15(1)(c).

²⁵⁶ Lloyd's Act 1911, s.9 and *ibid.*, s.7(d); and see *ibid.*, s.7(c) as substituted by Lloyd's Act 1982, s.15(1)(b). '[I]ncome therefrom' is probably a drafting infelicity rather than an attempt to distinguish investment income from capital.

²⁵⁷ Lloyd's Act 1911, s.9.

²⁵⁸ Discussed, by jurisdiction, in *Astor's Law of Lloyd's*, 2nd Ed.

²⁵⁹ An unlimited bond from the "Society" *SOD*, p.124.

²⁶⁰ Summarised at *SOD*, p.124: "Lioncover and the PCW Names have an unlimited indemnity from the Society As part of the Reconstruction and Renewal plan, it is proposed that Lioncover's reinsurance liabilities will be reinsured ... into Equitas However, the Society remains contingently liable to indemnify Lioncover and the PCW Names in respect of any shortfall." And see *SOD*, p.6; GR 1996, p.21 ("Security underlying policies issued at Lloyd's: financial data as at 31 December 1996", note 6): "The Central Fund ... provides the security for the bond in favour of Lioncover, which may be called upon in the event that Lioncover's funds are considered to be inadequate to meet further liabilities as they arise". See more recent Corporation RAs.

²⁶¹ The Corporation appears not to maintain a contingency fund to pay damages.

²⁶² Such as that considered in *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J), the judge expressing disquiet about false statements in sales propaganda published by self-regulators-at-Lloyd's without deciding — because the plaintiff assured's-at-Lloyd's claim hap-

misrepresenting the quality of securitisation at Lloyd's; recent advertising material may be considered particularly infelicitous.²⁶⁴ In such complaints assureds-at-Lloyd's may find themselves competing for the same assets with Members and SYA participants in relation to the enterprise's corresponding BO blandishments.²⁶⁵

- 2.39** In *Industrial Guarantee Corporation v Lloyd's*,²⁶⁶ apparently the only English case on the point, the plaintiff assured-at-Lloyd's claimed, apparently in contract, against the Corporation personally for the relevant insurance debts of (as it is appropriate to call him given the case's vintage) a defaulting insolvent underwriter at Lloyd's. The judge accepted the Corporation's substantive defence of defects in the underlying insurance transaction.²⁶⁷ He did, however, consider a pamphlet (not dissimilar in content to ones published in more recent times by self-regulators-at-Lloyd's) published by the Lloyd's enterprise as an inducement to buy insurance at Lloyd's, proclaiming "It has justly been said that Lloyd's has solved the problem of com-

pened in that case to have been fraudulent (*ibid.*, 83) — what he said was a very difficult point (the defendant Corporation pleaded (at *ibid.*, 79) that the literature was not an offer to the plaintiff assured-at-Lloyd's). *Ibid.*, 82-83 (Bailhache J):-

If I had to consider this question: what meaning does the pamphlet issued by Lloyd's Committee convey to a person who knows nothing about the business of Lloyd's and is making up his mind whether he shall insure with Lloyd's or whether he shall insure with the companies? and if I were asked whether a person reading that pamphlet in that way would reasonably suppose that the Committee of Lloyd's stated there and offered that if he would insure with Lloyd's the Corporation of Lloyd's would be answerable for his insurances, and whether his underwriters paid or not they would, I should consider the question a question of very great difficulty. There are one or two statements in that pamphlet which certainly cannot be supported. There is the statement, for instance, that there is individual initiative together with corporate liability. There is no corporate liability. There is a statement that the premium income of Lloyd's is now £30,000,000 a year. As a matter of fact, Lloyd's have no premium income at all. They have not £30,000,000 or thirty pence of premium income. Those two statements ought not to be in that pamphlet, and there are others which, I think, might be calculated to mislead, and if I were on the Committee of Lloyd's, as I am sorry I am not, one of the first things I should do would be to withdraw this pamphlet and to recast it and to take out from it the statements which to my mind are misleading. I am not, however, driven to decide the question what is the right view to take if a person knowing nothing about it had had that pamphlet put into his hands to assist him to decide whether he should insure with Lloyd's or with one of the companies. That, I think, is a difficult question which would have to be decided, not on the one or two erroneous statements in it but upon what is the true effect of the whole pamphlet; and I do not decide it because in this case it is not necessary. I do not decide it because I do not regard the claim in this case as an honest claim.

²⁶³ Such as insurance policies issued by LPSO or LPSO Ltd.

²⁶⁴ See for example the advertisement in *Financial Times*, March 20, 2001, p.17:-

More than 1300 individual underwriters write insurance at Lloyd's of London. The competition of the marketplace guarantees clients keenness of pricing and flexibility of cover. And with 62% of our capital provided by major international insurers, Lloyd's is firmly positioned at the heart of the global insurance industry. Lloyd's — www.lloydsolondon.com[.]

Infelicities include (for example): (1) the number of active underwriters (what the advertisement mistakenly calls "underwriters") is irrelevant to the quality of the insurance product or the funds securitising payment of claims; (2) "62% of our capital" refers to such corporate Members' PILs, not the assets of any part of the Lloyd's enterprise; (3) whether a corporate Member's assets suffice to meet its relevant Participation Liabilities is an entirely different matter, especially since there is no self-regulatory, legal, commercial or other necessary relationship or other connection between that PIL and those liabilities; (4) in any event, a corporate Member's personal-use funds are not common-use funds or the property of the Lloyd's enterprise; (5) because of the personal-use and common-use funds distinction at Lloyd's, ascertaining which funds are available to pay which claims can be complicated.

²⁶⁵ On the lines of *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J) and *ibid.*, {2b} [2002] EWCA Civ. 1101 (CA; appeal dismissed).

²⁶⁶ (1924) 19 Lloyd's List Law Reports 78 (Bailhache J). And see incidentally *Rozanes v Bowen* (1928) 32 Lloyd's List Law Reports, 98 (CA); *Portavon Cinema Co. Ltd. v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601.

²⁶⁷ *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 82-83 (Bailhache J):-

There is the statement [in the pamphlet published by self-regulators at Lloyd's] ... that there is individual initiative together with corporate liability. There is no corporate liability.

binning individual energy, enterprise and initiative with the *collective security of a corporate body*. From this you will realize that Lloyd's is the largest insurance institution in the world."²⁶⁸ The then self-regulators-at-Lloyd's made special mention in the pamphlet of the insurer's personal insolvency: "A Lloyd's underwriter's liabilities on a Lloyd's policy are fully secured. His bankruptcy could have no effect whatever on his undertakings with Lloyd's."²⁶⁹ The judge found that the pamphlet contained 'misleading' statements, and some statements "which, I think, might be calculated to mislead",²⁷⁰ and "[t]here are one or two statements in that pamphlet which certainly cannot be supported".²⁷¹ But the Corporation's personal liability had to be decided "upon what is the true effect of the whole pamphlet; and I do not decide it because in this case it is not necessary".²⁷² Judgment was given on May 5, 1924. The Central Fund Agreement is dated May 18, 1927.

MO liability

- 2.40 The Corporation appears to provide no MO funds of its own.

BO liability to a SYA participant

- 2.41 The Corporation does not expressly undertake to any Member to make its personal assets available for any purpose, including to remedy his SYA-level defaults or by way of compensation. No Corporation indemnity protects any Member's or SYA participant's assets, even when put at risk by self-regulators-at-Lloyd's own self-regulatory failure.²⁷³ Any such indemnity, if it could be conjured, would presumably be conditional on the Member's prior compliance with his BO obligations, such as prior utilisation of all his available FAL and OPW.²⁷⁴

external insurance regulatory liability

- 2.42 The Corporation has no liability to any private person for contravention of LLD's solvency requirements.²⁷⁵

criminal liability

- 2.43 An unpaid valid-claimant assured-at-Lloyd's will also wish to have in mind a person's criminal liability under FSMA 2000, s.397 for misleading statements and practices, especially statements and practices giving relevant false impressions.

LLD provisions

- 2.44 LLD appears to be of the view — regulatory solvency²⁷⁶ aside — that the Corporation's personal assets necessarily and unavoidably guarantee each SYA participant's

²⁶⁸ *Ibid.*, §78; italics added.

²⁶⁹ *Ibid.*, 79.

²⁷⁰ *Ibid.*, 83.

²⁷¹ *Ibid.*, 83.

²⁷² *Ibid.*, 82-83 (Bailhache J).

²⁷³ See for example *Treasury Sel. Comm. 1*.

²⁷⁴ And see *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 83 (Bailhache J):-

[I]t is ... wholly impossible to hold that a person who conspires with another to conceal from the Committee of Lloyd's the transactions of that other can possibly be held entitled, after continuing as he knows without the consent of Lloyd's and against their will if they knew the facts, and having increased his liabilities, to expect the Committee of Lloyd's to be responsible for them.

²⁷⁵ See ¶1.3.

²⁷⁶ See Chapter 1.

insurance liabilities,²⁷⁷ and that those assets are to be used to pay, and should be managed with a view to being able to pay, SYA participants' insurance liabilities. The starting point is FSA Glossary's definition of "central assets", *viz.*, "assets that the Society owns and amounts that members are liable to pay to the Society (or may by resolution of the Council be liable to pay) as contributions to the Central Fund (excluding amounts which, if paid by a member, would cause his assets to fall short (or shorter) of the required amount)".

- 2.45** LLD particularly imposes financial and managerial obligations on the Corporation of a general character, arguably going beyond mere regulatory solvency, such as to (for example): (1) maintain "central assets" sufficient to cover (among other things) each SYA participant's general business deficit and SYA participants' overall general business deficit;²⁷⁸ and must keep the FSA informed of its failure to do so;²⁷⁹ (2) "identify its assets and value them in accordance with this chapter and LLD 14 ('Assets: market and credit risk)";²⁸⁰ (3) "having regard to the availability and value of the central assets of the Society, ensure that its assets and its members' assets are adequate to meet the liabilities which members assume in their insurance business at Lloyd's";²⁸¹ (4) ensure that those assets are ready to be used to pay claims;²⁸² (5)

²⁷⁷ See for example LLD, §11.5:-

11.5.1 The Society must calculate the required minimum margin it would have to maintain under IPRU(INS) 2 (Margins of solvency) if it were an insurer carrying on all the general insurance business carried on by its members, but eliminating inter-syndicate reinsurance (the Society margin). 11.5.2 The Society must calculate the guarantee fund it would have to maintain under IPRU(INS) 2 (Margins of solvency) if it were an insurer carrying on all the general insurance business carried on by its members, but eliminating inter-syndicate reinsurance (the Society guarantee fund). 11.5.3 The required minimum margin and the guarantee fund must, under IPRU(INS), at least equal the minimum guarantee fund. So the Society margin and the Society guarantee fund must at least equal the minimum guarantee fund which would apply if the members taken together constituted an insurer, other than a mutual, authorised for all classes of general insurance business carried on at Lloyd's. ... 11.5.5 For the purpose of LLD 11.5.1R and LLD 11.5.2R the Society may make appropriate approximations, taking reasonable care to avoid underestimating the Society margin and the Society guarantee fund.

²⁷⁸ LLD, §11.2.1:-

The Society must maintain net central assets which are adequate to cover the aggregate of: (1) for each member, the amount by which his general insurance business assets are less than the required amount calculated under LLD 11.2.6R; (2) for each member, the amount by which his long-term insurance business assets are less than the required amount calculated under LLD 11.2.7R; (3) the excess (if any) of the amount calculated under LLD 11.5.1R (the Society margin) over the sum for all members of the members' margins for general insurance business; and (4) the excess (if any) of the sterling equivalent of 800,000 Euros (using the conversion rate notified by the FSA from time to time for this purpose) over the sum for all members of the members' margins for long-term insurance business.

And see *ibid.*, §9.3.5: "The central prudential safeguard is for the Society to maintain sufficient net assets to cover any shortfall in members' resources."

²⁷⁹ LLD, §11.2.4:-

The Society must inform the FSA promptly if: (1) its net central assets fall below the amount required under LLD 11.2.1R; or (2) it cannot confirm that it has maintained the net central assets required under LLD 11.2.1R. If the Society fails to maintain the net central assets required under LLD 11.2.1R, the FSA would expect to require the Society to prepare and submit a plan for the restoration of a sound financial position similar to that required from insurers by SUP App 2 1.3, and other remedies might also apply, including the FSA's exercise of its own-initiative power under section 45 of the Act (Variation etc. on the Authority's own initiative).

And see similarly *ibid.*, §11.2.11.

²⁸⁰ LLD, §13.2.1.

²⁸¹ LLD, §9.2.5.

²⁸² LLD, §9.2.6: "The Society must: (1) ensure that its admissible assets: (a) that are investments are diversified and adequately spread; and (b) taking into account the risks posed to the Society by its activities and by the insurance business carried on by members, are of appropriate safety, yield, maturity and marketability[.]". And see *ibid.*, 13.3.1 etc. including (for example) *ibid.*, §13.3.1 "LLD 9.2.6R requires the Society to ensure that its admissible assets, and to take reasonable steps to ensure that members' admissible assets, are of appropriate maturity and marketability. In doing so, the Society should have regard to the

"manage its affairs, including the exercise of its byelaw-making powers, with due regard to the interests of policyholders and potential policyholders".²⁸³ No mention is made of EquitasRe-assureds-at-Lloyd's;²⁸⁴ (6) "ensure that its affairs are soundly and prudently managed and take reasonable steps to ensure that the Lloyd's market is soundly and prudently managed".²⁸⁵

LLD, §3.2.1G

- 2.46 To the extent that the Central Fund is owned by the Corporation and is thus a way of infiltrating Central Fund liabilities into the Corporation's own balance sheet, it is appropriate to mention that the FSA tentatively²⁸⁶ expresses the wish, in LLD §3.2.1G, that the Lloyd's enterprise 'should seek to ensure that the Central Fund provides protection for policyholders so as to minimise the need for Lloyd's policyholders to have recourse to the compensation scheme.' This is discussed elsewhere.²⁸⁷

other liability: restitution suits

- 2.47 In slavery restitution and similar claims, the correct defendant to a suit involving the lawful or unlawful insuring of lawful or unlawful cargoes of slaves is presumably: (1) the relevant successors of the coffeehouse patrons who earned premium from insuring the voyages; (2) the Corporation on some Lloyd's Act 1871, s.9 (or other²⁸⁸) theory of succession.²⁸⁹ The Council has been given a statutory²⁹⁰ discretion to give away the Corporation's property, and has given itself a byelaw²⁹¹ discretion to give away the Central Fund. Presumably the Council's decision to do either in relation to slave trade reparations by way of *ex gratia* payment is challengeable by Members, and not by non-Members, in the ordinary way.

THE COUNCIL

tenure

- 2.48 The Council may terminate a nominated Council member's tenure if he becomes bankrupt or makes any arrangement or composition with his creditors generally or

expected timing of liabilities (especially policyholder claims) and the need to make a prudent allowance for the risk that liabilities may fall due earlier than expected." Per FSA Glossary, "admissible asset" means "an asset that may be taken into account for the purposes of the solvency requirements in LLD 11.2.1R in accordance with LLD 13.4.1R".

²⁸³ LLD, §9.2.1.

²⁸⁴ Cf. at LLD, §12.3.3(4)R in the context of relevant liabilities.

²⁸⁵ LLD, §9.2.2.

²⁸⁶ Recalling the remarks of *Penrose* on the regulatory shortcomings of relevant DTI officials in regulating Equitable Life. On the FSA's mistaken belief that LLD, §3.2.1G is a rule, see ¶P12(8).

²⁸⁷ See Chapter 4.

²⁸⁸ See the intriguing but inconclusive hint at Lloyd's Act 1871, ninth unnumbered recital ('And whereas, by reason of the mode in which the business of insurance has always been carried on by members of the Society, the names of those who underwrite a particular policy cannot, when a considerable time has elapsed, be traced with certainty, if at all, especially as regards policies anterior in date to one thousand eight hundred and thirty-eight ...'), the point of which is not clear given *ibid.*, s.40.

²⁸⁹ See Lloyd's Act 1871, s.9, which appears wide enough to make the Corporation the successor to liability only of the particular incarnation of the Establishment constituted or regulated by particular deeds of association and accession (*viz.*, those referred to at Lloyd's Act 1871, recital [2], ss.2, 5), and only in relation to things done or suffered by or with reference to the 'Committee for managing the affairs of Lloyd's or by particular persons and or trustees.

²⁹⁰ See Lloyd's Act 1911, s.7(c).

²⁹¹ See OCFB, §7; NCFB, §8.

applies to the court for an interim order under Insolvency Act 1986, s.253 in connection with a voluntary arrangement under that Act.²⁹² Similar provisions apply to Disciplinary Committees²⁹³ and Appeal Tribunal members.²⁹⁴

generally

- 2.49** The unincorporated Council does not trade. Its members do have personal liability for their acts and defaults in the ordinary way: see Lloyd's Act 1982, s.13.²⁹⁵ The unincorporated Council is somewhat analogous to a registered company's board. Whether the assured-at-Lloyd's has an action against individual Council members in relation to the Lloyd's enterprise's centrally published blandishments, if untrue, about the nature and quality of claims payment securitisation at Lloyd's, depends on the case.

THE MEMBER

orientation

effect of insolvency on Membership and Membership activities

- 2.50** Bankruptcy or an adjudication in an EEC member state of insolvency is automatically fatal to Membership.²⁹⁶ (*cf.* SYA-level relationships). If a Member be adjudicated²⁹⁷ bankrupt, or adjudicated or declared insolvent, by the due process of law of any EEC²⁹⁸ member state, the Council²⁹⁹ must³⁰⁰ 'forthwith' declare his Membership

²⁹² Byelaw 18 of 1996, §18(5)(a). See also Byelaw 16 of 1983, §(vi) (suspension from Council etc. membership).

²⁹³ See Byelaw 31 of 1996, §4(e).

²⁹⁴ See Byelaw 32 of 1996, §3(d).

²⁹⁵ And see incidentally (for example) *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm) (Langley J).

²⁹⁶ See Lloyd's Act 1982, s.9 (previously Lloyd's Act 1871, s.22). Indeed, the only statutorily regulated aspect of Membership (*cf.* SYA participation) is compulsory termination in certain insolvency events. All other aspects, including recruitment, suspension and termination, are devised, self-regulated and implemented by self-regulators at Lloyd's by or further to byelaw.

²⁹⁷ The production of a receiving order in bankruptcy or an adjudication of bankruptcy or a declaration or adjudication of insolvency or any other order of a kind referred to in the definition of 'insolvency event' by a Court sealed, stamped or otherwise duly certified by the Court in question shall, unless that order declaration or adjudication has been set aside on appeal or otherwise, be conclusive evidence of the fact that the order, declaration or adjudication has been made by the due process of law of the relevant country: Byelaw 17 of 1993, §46(7).

²⁹⁸ This provision therefore does not apply to adjudications or declarations of bankruptcy or insolvency in any other jurisdiction (the United States or a Commonwealth jurisdiction, for example). The provision says "any country within the European Economic Community": on the obsolescence of "European Economic Community" for most general purposes, see, for example, the Treaty establishing a Single Council and a Single Commission of the European Communities (April 8, 1965), and the Single European Act (February 17, 1986 and February 28, 1986) *et seq.*

²⁹⁹ Lloyd's Act 1982, s.9 requires the declaration to be made by the Council. On the Council's powers of delegation, see generally *ibid.*, s.6(5)-(7).

³⁰⁰ Byelaw 17 of 1993, §46(1). If that adjudication or declaration be set aside on appeal or otherwise, or if the Council's declaration be set aside on appeal under Byelaw 7 of 1983), then the Council shall 'forthwith' cancel its declaration: *ibid.* Lloyd's Act 1982, Sch. 2 (2) empowers the Council to make byelaws '(2) For requiring an underwriting member to cease to be a member of the Society or to cease underwriting, temporarily or indefinitely, in the event that — (a) a receiving order in bankruptcy is made against such member by the due process of law in any country; or (b) such member makes or proposes any composition with his creditors or otherwise acknowledges his insolvency; or (c) by the due process of law of a country outside the European Economic Community such member is adjudicated bankrupt or is adjudicated or declared insolvent; and for regulating the procedure to be followed in such event[.]' The process of promulgating byelaws is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

to have ceased and notify his members' and managing agencies.³⁰¹ Separately, the Council may³⁰² declare that a Member shall 'forthwith cease' to be a Member, or may require him to cease underwriting, if an 'insolvency event'³⁰³ occurs in relation to that member. Before the Council makes any such declaration it must generally (see *ibid.*, §46(4-5)) inform the member in writing of its intention and of the grounds for the intended declaration;³⁰⁴ and allow him to make representations as to the intended declaration within such period as it may prescribe.³⁰⁵ A Member who is bankrupt or insolvent may be represented at a Corporation EGM by his insolvency guardian.³⁰⁶ Presumably at contractual level the effect of Lloyd's Act 1982, s.9 is to irrevocably discharge the General Undertaking, which is the sole basis for Membership. The Council appears to take the view that it has perpetual jurisdiction over such a Member.³⁰⁷

self-regulatory solvency

- 2.51** On self-regulatory individual solvency (*cf.* FSA-administered enterprise-level solvency³⁰⁸), self-regulators-at-Lloyd's promulgate detailed requirements (outside this Edition's scope³⁰⁹). The basic requirements, supplemented annually by bulletin, are

³⁰¹ Byelaw 17 of 1993, §46(6). Historically, see for example byelaw 12 as at May 1863 quoted at *Lloyd's v Harper* (1880) 16 Ch.D.290, 293 (CA; "[I]f any member or subscriber shall become bankrupt or insolvent, or shall suspend payment, or shall take or apply to take the benefit of any Act for the relief of insolvent debtors, or shall place his affairs in the hands of inspectors or trustees, or shall make, or propose to make, any composition with his creditors, such member or subscriber shall thereupon cease to be a member or subscriber, and a minute thereof be entered on the proceedings of the committee").

³⁰² Byelaw 17 of 1993, §46(2). If the 'insolvency event' is set aside on appeal or otherwise, or the Council's declaration or requirement is set aside on appeal under Byelaw 7 of 1983, then the Council must 'forthwith' cancel its declaration and any such requirement shall no longer apply: *ibid.*

³⁰³ Per Byelaw 17 of 1993, Sch., §1, 'insolvency event':-

(a) in relation to an individual member, the making of a receiving order in bankruptcy against such member by the due process of law of any country, such member making or proposing any composition with his creditors or otherwise acknowledging his insolvency, or being adjudicated bankrupt or adjudicated or declared insolvent by the due process of law of a country outside the European Economic Community; (b) in relation to a corporate member which is a body corporate, its making or proposing any composition with its creditors or otherwise acknowledging its insolvency, a proposal being made in respect of it under section 2 of the Insolvency Act 1986, a bankruptcy order being made against it by the due process of law of any country, its being adjudicated or declared insolvent by the due process of law of any country, an order being made or resolution being passed for its winding up or dissolution, an administration order being made in respect of it under section 9 of the Insolvency Act 1986, a receiver, trustee or analogous officer being appointed in respect of the whole or any material part of its property or assets, its directors presenting or filing in any court a petition in respect of its bankruptcy, winding up or other insolvency or which seeks any reorganisation, dissolution or similar relief or there occurring an event in any jurisdiction which is analogous to any of the foregoing events; (c) in relation to a corporate member which is a Scottish limited partnership, granting a Trust Deed for or making or proposing any composition with its creditors or otherwise acknowledging its insolvency, the award by a court of an order of sequestration in respect of it or any of its general partners under the Bankruptcy (Scotland) Act 1985, a bankruptcy order being made against it by the due process of law of any country, its being adjudicated or declared insolvent by the due process of law of any country, an order being made or resolution passed for its winding up or dissolution, a judicial factor, a receiver, trustee or analogous officer being appointed in respect of the whole or any material part of its property or assets, its partners or any one of them presenting or filing a petition for its sequestration in respect of its bankruptcy, winding up or insolvency or which seeks any reorganisation, dissolution or similar relief, or there occurring any event which would otherwise render it apparently insolvent in terms of section 7 of the Bankruptcy (Scotland) Act 1985, or an event in any jurisdiction which is analogous to any of the foregoing events.

³⁰⁴ Byelaw 17 of 1993, §46(3)(a).

³⁰⁵ Byelaw 17 of 1993, §46(3)(b).

³⁰⁶ See generally Byelaw 17 of 1996, §6 etc. for detailed provisions.

³⁰⁷ See for example (so far as relevant to former Members) the recent PCW novation and RRC 4's treatment of 'Closed Year Names'.

³⁰⁸ See Chapter 1.

³⁰⁹ But discussed at the usual source.

at Byelaw 13 of 1990 ('Solvency and Reporting Byelaw'), which provides for various solvency-oriented reporting at the level of Member³¹⁰ (so-called 'asset return') and, separately, 'syndicate'³¹¹ (so-called 'syndicate return'; it is difficult to deduce from the definition whether one particular SYA stamp or all SYA stamps of a particular syndicate is meant³¹²). The Member-level asset returns and the syndicate return must be audited.³¹³ Additionally, the Corporation apparently prepares annually a so-called 'solvency statement' for each Member.³¹⁴ Where the solvency statement shows a relevant deficit, the Member must 'forthwith' provide sufficient funds to remedy it.³¹⁵ There are detailed provisions concerning valuation of assets³¹⁶ and liabilities.³¹⁷ None of this bears on any assured-at-Lloyd's. In BBSN circumstances, it is irrelevant, and in not-BBSN circumstances it is meaningless.

Member and SYA participant distinguished

- 2.52** No mere Member *per se* conducts any insurance business. Membership — fundamentally a mere self-regulatory jurisdictional device — is not synonymous with SYA participation. It is singular that no such rigorous terminological distinction exists at Lloyd's or is in common use by external insurance regulators. Especially given that one can be a Member without being a SYA participant (*viz.*, for example, a not-underwriting or non-underwriting Member), and *vice versa* (*viz.*, a participant on a closed YA, the stamp of which is still party to an undischarged, though conventionally outward-RTCed insurance contract), the insurance substance lies in SYA participation, which is altogether different to Membership. Indeed, the only way in which an underwriting Member is permitted to conduct insurance business at Lloyd's is not as a Member at all but as a SYA participant. Membership is essential to obtaining from the Council the UY-based OPIL — closely akin to gambling chips — necessary for (UY-based) SYA participation, but the latter is a contractual

³¹⁰ See for example Byelaw 13 of 1990, §4 (asset return for Member prepared by his members' agency; *q.v.* for detailed provisions); *ibid.*, §4A (asset return procured by a corporate Member which does not have a members' agency; *ditto*); *ibid.*, §4B (separate asset return for each Member to be produced by the Corporation). And see recently for example Mkt. Bn. Y3167 (October 20, 2003; '2003 asset return').

³¹¹ Byelaw 13 of 1990, §2; *q.v.* for detailed provisions, which should be read in conjunction with the voluminous requirements promulgated supplementarily.

³¹² See Byelaw 13 of 1990, Schedule 1, §1, definition of 'syndicate' ('an underwriting member or group of underwriting members of Lloyd's underwriting insurance business at Lloyd's through the agency of a Lloyd's underwriting agent to which member or group a particular syndicate number is assigned by the Council').

³¹³ Byelaw 13 of 1990, §3 (syndicate return); *ibid.*, §5 (Member-level asset returns where members' agency); *ibid.*, §5A (Member-level asset return where no members' agency); *ibid.*, §5B (Member-level asset return prepared by the Corporation).

³¹⁴ See Byelaw 13 of 1990, §6; *q.v.* for detailed provisions.

³¹⁵ See Byelaw 13 of 1990, §7 (Member with a members' agency; the latter 'forthwith request[s]' the Member to make sufficient funds available, in the relevant currency: *ibid.*, §7(1)), and *ibid.*, §7A (corporate Member without a members' agency; the corporate Member must supply the necessary funds 'forthwith' on receiving the solvency statement: *ibid.*, §7A(1)). And see *ibid.*, §8. See recently (for example) Mkt. Bn. Y3124 (August 27, 2003; 'Membership & underwriting requirements: coming-into-line for 2004').

³¹⁶ See generally Byelaw 13 of 1990, §9 ('Valuation of assets and liabilities'), which should be read with such documents as (for example) Conditions and Requirements relating to Solvency, which is at Mkt. Bn. Y3172 (October 28, 2003; 'Solvency test: eligible asset rules'), Annex 1. On eligible assets, see *ibid.*, §3 and *ibid.*, App. 2A; on excluded assets, see *ibid.*, §4. On restricted assets, see *ibid.*, App. 2B. On determining the market value of eligible assets, see *ibid.*, App. 2C.

³¹⁷ See generally Byelaw 13 of 1990, §9 read with (for example) Valuation of Liabilities for Lloyd's Solvency Purposes, which is at Mkt. Bn. Y3165 (October 17, 2003; 'December 2003 solvency test: valuation of liabilities'); *q.v.* for detailed provisions.

state³¹⁸ which, like each insurance contract to which the SYA participant is a party, has an existence independent of the contract and state of Membership.

- 2.53** The insurer at Lloyd's is thus subject to three separate, independent, parallel layers of contracts (discussed in detail elsewhere³¹⁹): (1) the contract of Membership, *viz.*, the General Undertaking (natural Member) or MA 1 (corporate Member), with subsidiary contractual instruments such as (for example) (as between the Member and the Corporation) relevant byelaws and other Member-level instruments, and (as between the Member and his members' agency) SMA 1; (2) the contract of SYA participation (*viz.*, latterly, SUA 1 / SCA 1), with subsidiary contractual instruments such as (for example) PTD-premium, and a multiplicity of claims payment securitisation trust deeds and FAL instruments; (3) insurance contracts. It will be noticed that insurance contracts form only a fraction, conceptually, of the SYA participant's commitments at Lloyd's. The multiplicity of layers, in a multitude of regulatory configurations (FO, MO, BO), demonstrates the importance of a SYA participant's insolvency guardian having complete familiarity with all relevant aspects of the Lloyd's enterprise and doing exhaustive due diligence on all instruments to which the SYA participant is party likely to give rise to liabilities, and precisely how each of those instruments is to be discharged.

regulatory failure to make the distinction

- 2.54** All regulatory measures directed to the SYA participant but addressed (as by the FSA) specifically to the Member³²⁰ or (by the EU) addressees even more remote³²¹ are terminologically and conceptually in error. In speaking, in relation to Members individually³²² and collectively,³²³ of the 'carrying on of an insurance market activity' (and see the infelicity at FSMA 2000, Sch, 6, §1(1)³²⁴), does FSMA 2000.³²⁵ For its part, the FSA does appear to be aware of the distinction, and to occasionally attempt to articulate it: see for example its use of "member"³²⁶ and "syndicate".³²⁷ The FSA does not, however, use terminology substantively, procedurally or conceptu-

³¹⁸ See SUA 1 / SCA 1. And see *P&B Run-Off Ltd. v Woolley* [2001] 1 All ER (Comm) 1120 (Andrew Smith J); [2002] Lloyd's Rep. IR 344; [2002] EWCA Civ. 65 (CA).

³¹⁹ See *Astor's Law of Lloyd's*, 2nd Ed.

³²⁰ Such as LLD, §12.2.2G, which nicely illustrates the problem.

³²¹ Such as "the association of underwriters known as Lloyd's" (which addresses neither Members nor SYA participants): First Non-Life Directive, §8.1(a); First Life Directive, §8.1(a); Reorganisation Directive, §§1 and 2(a).

³²² FSMA 2000, s.316(1)(a).

³²³ FSMA 2000, s.316(1)(b).

³²⁴ FSMA 2000, Sch. 6 ('Threshold conditions'), Part I ('Part IV permission'), §1(1) (read with *ibid.*, s.41(1):-

If the regulated activity ... is the effecting or carrying out of contracts of insurance the authorised person [see *ibid.*, s.19(1) etc.] must be a body corporate..., a registered friendly society or a member of Lloyd's.

³²⁵ And see the definition, unhelpful in relation to the distinction (the draftsman seemingly unaware of FSMA 2000's (misconceived but serviceable) use of 'member of the Society', of "syndicate" at FSA Glossary ('one or more "persons", to whom a particular syndicate number has been assigned by or under the authority of the "Council", "carrying out contracts of insurance" or "effecting contracts of insurance" written at Lloyd's.').

³²⁶ Per FSA Glossary, "member" (so far as presently relevant): 'a "person" admitted to membership of the "Society" or any "person" by law entitled or bound to administer his affairs'.

³²⁷ Per FSA Glossary, "syndicate": one or more "persons", to whom a particular syndicate number has been assigned by or under the authority of the "Council", "carrying out" or "effecting contracts of insurance" written at Lloyd's.'

ally consistently or appositely,³²⁸ including in relation to SYA participants who are not Members.³²⁹

differences between natural and corporate

- 2.55** The notion that a natural Member sells insurance with unlimited liability while a corporate Member does so with limited liability is multiply erroneous. A mere Member *per se* who is not a SYA participant does not sell insurance at all. A natural and corporate SYA participant are identically liable without limitation to the quantum of a particular contracted-for insurance liability.³³⁰

corporate Member: self-regulation on insolvency

- 2.56** No person may be a controller of a corporate Member, or of two or more corporate Members, without the Council's prior written consent.³³¹ Without such consent, no corporate Member may cause or permit any of the following: (1) the appointment of a person as a director or manager of the corporate Member; (2) a merger between the corporate Member and another body corporate; (3) the appointment of itself as a director of another corporate Member; (4) an 'insolvency event';³³² (5) any event requiring the Council's agreement under the byelaw, or any conditions and requirements prescribed by it under the byelaw; (6) any other event which the Council prescribes.³³³

- 2.57** A corporate Member must promptly notify the Council in writing (with such information as it may prescribe) of any of the following: (1) the occurrence of an 'insolvency event'³³⁴ in relation to him or it; (2) a material change in any information furnished to the Council in connection with an application by that member for membership or in connection with a review under paragraph 11 of the [admission] of that member and not required to be disclosed under any other provision of the relevant paragraph; (3) any other event which the Council may prescribe.³³⁵

FO relations with assured-at-Lloyd's

- 2.58** The Member has no direct FO relations with any assured-at-Lloyd's; and in BBSN circumstances there appears little or no point in any such relations.

Membership-level several liability

- 2.59** Member-level and SYA-level liabilities, though they emanate from insurance transactions (and then not necessarily the same ones) are wholly different in nature. Most importantly, unlike a SYA participant, a Member has no insurance liabilities

³²⁸ See for example LLD, *passim*; Regulated Activities Order, §13; etc.

³²⁹ The FSA traverses the issue by regulating former Members — see for example FSMA 2000, s.320-2; LLD, Chapter 5; Regulated Activities Order, §13(1)(b), etc. — but that is arguably not the correct conceptual approach, especially since the Council's financial self-regulatory jurisdiction over a former Member is merely arguable.

³³⁰ See ¶2.80.

³³¹ Byelaw 17 of 1993, §14(1)(a)-(b). The Council may grant consent on terms it thinks fit: *ibid.*, §14(6); and see *ibid.*, §14(7). The applicant for consent must pay the Corporation such fee, and supply such additional information, documents *etc.*, as the Council prescribes: *ibid.*, §14(8).

³³² 'Insolvency event' is discussed at §2.49.

³³³ Byelaw 17 of 1993, §14(2)(a)-(f). The Council may grant consent on terms it thinks fit: *ibid.*, §14(6); and see *ibid.*, §14(7). The applicant for consent must pay the Corporation such fee, and supply such additional information, documents *etc.*, as the Council prescribes: *ibid.*, §14(8).

³³⁴ See ¶2.50.

³³⁵ Byelaw 17 of 1993, §14(3)(c)(i)-(iii).

as such and no contractual relationship with any assured-at-Lloyd's. Whereas only every relevant SYA participant is contractually³³⁶ liable in relation to insurance contracts, every Member is contractually liable to the Corporation to make relevant proper contribution to central funds regardless of any particular insurance transaction. The principal Membership-level contribution levied by the Council is that to the Central Fund and its immediate satellites. Whereas the assured-at-Lloyd's is entitled to collect against every relevant *solus*, there seems to be no present basis in English law entitling him to collect any sum from any Member.

mutualisation

scope

- 2.60** This section provides a conceptual orientation to the later discussion of a Member's liability to discharge a SYA participant's insurance liabilities.

generally

- 2.61** Consideration of a 'common enterprise' (discussed below) tends to raise the issue of CU not-dedicated funds, and mutualisation. As to the latter, the Lloyd's enterprise is not generally to be considered to be a conventional or unconventional mutual society. A conventional mutual body itself sells insurance exclusively to its own members, who severally contribute reserves to a common central fund. At Lloyd's, by contrast, the Corporation itself — though it is empowered and does happen, as an express³³⁷ and inherent³³⁸ surety, to discharge insurance liabilities incurred at Lloyd's, and though Members do contribute to central reserves — does not expressly contractually sell insurance to Members, SYA participants or anyone else. The insurance-selling function is carried on principally, and on his own account rather than as the Corporation's proxy, by only such underwriting Member as has adopted the altogether distinct³³⁹ and separate capacity of SYA participant, currently the fundament (though of decreasing significance) in accordance with which certain PU and CU, dedicated and not-dedicated claims payment securitisation funds are configured.
- 2.62** Members do not associate for the principal purpose of insuring one another — although such incestuous insurance is well established, especially in relation to the very insurance products intended to protect Members, *viz.*, PSL and e&o. Indeed, Members do not associate with one another at all, whether as Members or as SYA participants, but with the Corporation, or members' or managing agencies, or trustees of premium sequestration trust funds. Of all the various contracts prescribed by self-regulators at Lloyd's, not one requires a Member or SYA participant to contract directly with any other Member or SYA participant.

SYA- and Member-level mutualisation distinguished

- 2.63** Notwithstanding that SYA participants are statutorily³⁴⁰ prohibited from assuming one another's insurance liabilities, they do sell RTC,³⁴¹ and a variety of insurance

³³⁶ *Viz.*, the insurance contract itself and, separately, PTD-premium and SUA 1 / SCA 1.

³³⁷ See Lloyd's Act 1911, s.7(d).

³³⁸ See Lloyd's Act 1911, s.7(d); and *ibid.*, (b) read with *ibid.*, s.4, second object.

³³⁹ A distinction emerging late in the Lloyd's enterprise's history and very imperfectly articulated by UK regulators nowadays. It is better understood and articulated by US state insurance regulators and the NAIC, largely because of associated dedicated PU and CU claims payment securitisation trust funds.

³⁴⁰ See Lloyd's Act 1982, s.8(1).

³⁴¹ Conventional RTC is not a species of re- or any other insurance.

products,³⁴² to themselves and to each other³⁴³ (as well as to third parties), and contribute severally to various SYA-level dedicated PU and CU funds specifically to cover (as appropriate) their own and other SYA participants' relevant defaults to themselves, each other and third parties. The view³⁴⁴ is misconceived that mutualisation stops when a Central Fund levy is not supported or that the Central Fund is limited to paying claims.³⁴⁵ Mutualisation devices other than the Central Fund include (for example) Centrewrite, Lioncover, Additional Securities, outward reinsurance from participants on one SYA to participants (who may be the same participants) on another SYA, common-use claims-securitisation trust funds,³⁴⁶ conventional RTC,³⁴⁷ and EquitasRe-RTC. R&R demonstrated how self-regulators-at-Lloyd's appropriated PU funds for mutualisation purposes.³⁴⁸

2.64 Members, on the other hand, appear to be under no such express statutory disadvantage, and have engaged — since the 1920s, apparently greatly to their and the Lloyd's enterprise's commercial benefit — in compulsory Member-level several-liability contributions to the Member-level CU Central Fund (and thence to various subsidiary central funds) for the principal purpose of remedying SYA participants' defaults in full. There appears to be no other expression of Members' obligation to contribute to central, or other, claims payment securitisation funds.

2.65 The Lloyd's enterprise thus has features not dissimilar from those of a mutual body — some analogies to Equitable Life are appropriate — but is more complex. There being no express provision in self-regulation or external insurance regulation that the Central Fund is necessarily the only Member-level CU fund, a crucial issue in an insolvency of the Lloyd's enterprise is likely to be the true extent of the Member-level contribution obligation, if any.

a "common enterprise"

2.66 It is appropriate to consider certain conceptual bases on which Lloyd's policy boilerplate 'each for his own part and not one for another' is not dispositive of the claims payment securitisation funds available to pay the assured's-at-Lloyd's valid

³⁴² Products include (for example) PSLI and various species of reinsurance. SYA participants' biggest source of outward reinsurance has been themselves and or other SYA participants.

³⁴³ Hence the FSA Glossary's (flawed) term "inter-syndicate reinsurance recoveries"; on which see for example LLD, Chapter 11.

³⁴⁴ *Kent RC*, §2.30 (p.16; "In the event that a levy was not supported, trading by Lloyd's members would have to cease. In that event, each member would be liable only for liabilities incurred on his behalf and not for the liabilities of others").

³⁴⁵ *Cf.* for example the misleadingly narrow *Captives Guidance Notes 1999*, Section D, §15. 1 (p.37):-
Each member of Lloyd's underwrites insurance business on a several basis for its own profit or loss. No member has joint liability with any other member for risks accepted. However, all members are required to contribute to the New Central Fund which is available ... to meet policyholders' claims.

³⁴⁶ See *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA).

³⁴⁷ The mutualisation aspects of conventional RTC were noticed in *S&M*, §11 (p.3):-

One of the striking features of the Lloyd's system is its sheer complexity. In particular, the extent to which the reinsurance to close ... system and the web of inter-syndicate insurances and reinsurances within the market lead to every Name being dependent on every other is difficult to grasp and even more difficult to quantify.

³⁴⁸ See for example GR 1996, p.17 ("Security underlying policies issued at Lloyd's as at 31 December 1996"):-

[T]he value of the various funds supporting Lloyd's security is shown as at 31 December 1996 and reflect[s] the transactions which have occurred in order to implement the reconstruction and renewal plan; these transactions involved the transfer of substantial assets from syndicates' premium trust funds ... in order to fund the reinsurance of liabilities relating to 1992 and prior non-life business into Equitas....

claim. The notion often arises³⁴⁹ in various contexts and for various purposes, that the Lloyd's enterprise's numerous disparate components amount to an homogenous

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See for example *Luce v Lloyd's of London* 868 F Supp 625, 627 (D Vt. 1994); *Portavon Cinema Co Ltd v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601 (Branson J). And see *In the Matter of Lloyd's of London [etc.]* Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist, §1 (p.1):-

Lloyd's of London is a common enterprise consisting of the following entities and individuals: the Council of Lloyd's ..., also known as the Society of Lloyd's; the Corporation of Lloyd's...; Members' Agents, Managing Agents, Lloyd's brokers, and Lloyd's Names.

And see *In the Matter of the Offering of Securities by Lloyd's [etc.]*, Docket No. S-3073-I, Arizona Corporation Commission, Notice of Opportunity for Hearing [etc.], §13:-

As a result of the various ways "Lloyd's" was used, the Arizona Names reasonably understood that the Corporation of Lloyd's is a participant in all facets of the insurance business operating under the name "Lloyd's".

And see *Allen v Lloyd's of London*, Civil Action No. 3:96cv522, *145 *et seq.*:-

In this case, sufficient indicia of interdependence between the players in the Lloyd's market has been established to make it reasonably likely that Names invested in the common entity of Lloyd's. ... [T]he "common enterprise" of Lloyd's is essential for Names to receive their paramount aim, a return on their investment. Names are attracted to Lloyd's because of its status and reputation. ... Lloyd's requires Names to "underwrite insurance at Lloyd's exclusively through one or more underwriting agents." ... Names depend on Managing Agents to select the risks underwritten through a syndicate, "set premium rates, receive premiums and pay claims to insureds on their behalf." ... And pursuant to the Lloyd's Bylaws, "The [managing] Agent undertakes to the Name that it will comply with the Lloyd's Acts 1871 to 1982 and with the requirements of the Council and will have regard to the codes of practice from time to time promulgated or made by the Council, which are applicable to it as a managing agent at Lloyd's." ... Finally, the viability of the Lloyd's market ultimately depends on the success of the syndicates. ... Even if Names' participation in Lloyd's does not evidence the interdependence required by *Howey*, plaintiffs have shown a reasonable likelihood of proving that the syndicates in which Names' participate constitute "common enterprises." According to Lloyd's own document, "The market is based upon the principle of risk spreading: each risk is underwritten by a number of syndicates each supported by individual and/or corporate members. The strength of Lloyd's policies lies in the levels of security provided by the Society's capital base — the resources of its members." (Hudson Aff. II, Exh. D). As such, underwriting risks "gain utility ... only when cultivated and developed as component parts of a larger area." n45 The evidence, thus, demonstrates that the common enterprise of either Lloyd's, the syndicates, or both was essential to Names' aim of obtaining profits, measured by the amount that premiums exceed claims and costs. ... [B]ecause reinsuring to close pre-1993 liabilities depends upon the centralization and common management of Equitas, and because the rebate of premiums to Names will be based on Equitas' aggregate surplus reserves, plaintiffs have shown a reasonable likelihood of success in proving that Equitas is a "common enterprise." ... Lloyd's contends that Equitas is not a common enterprise because Names will not share in its profits or losses. Lloyd's also points out that Names have no right to the assets of Equitas and that Names remain severally liable. These facts, even if true, do not prevent a finding that horizontal commonality exists.

And see for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5 ("The financial distress that forced Lloyd's to restructure also caused collateral damage to a critical component of the market's historic success — the perception of Lloyd's, amongst its customers, as a single business enterprise offering a uniformly high level of financial security"). But see (correctly) *Travelers Indemnity Co. v Booker*, 657 F Supp. 280, 282 (DDC 1987): "Contrary to the popular conception, Lloyd's is not a monolithic institution, nor does it operate in the same manner as a corporation in this country".

(and wealthy³⁵⁰) single entity³⁵¹ (sometimes imperfectly analogised to, for example, the New York Stock Exchange³⁵² or a club³⁵³). For example:-

(1) self-regulators-at-Lloyd's aver, technically multiply erroneously, that "Lloyd's" is a 'single licensed, regulated entity with a brand name and a system of financial security'.³⁵⁴ At the time of R&R, self-regulators-at-Lloyd's repeatedly referred to the Lloyd's enterprise *per se* as a 'going concern'.³⁵⁵ Prospective assureds-at-Lloyd's are solicited³⁵⁶ similarly,³⁵⁷ without disclaimer,³⁵⁸ aided by the familiar trademark

³⁵⁰ See for example *Liberty Transp., Inc. v Harry W. Gorst Co.* No. B045194 Court of Appeal of California, Second Appellate District, Division Seven 229 Cal. App. 3d 417; 1991 Cal. App. LEXIS 358; 280 Cal.Rptr. 159; 91 Cal. Daily Op. Service 2846; 91 Daily Journal DAR 4392 (1991) 229 Cal. App. 3d 417, 437:-

Appellants argue because the London based insurance companies were referred to as "London insurers" this created an improper inference appellants were associated with Lloyds of London and were therefore vastly more wealthy than respondent.

And see *Harvey-Latham Real Estate v Underwriters At Lloyd's, London*, 574 So. 2d 13 (Supreme Court of Mississippi 1990) 15 ("It is recognized by this Court that Lloyds of London is a corporate defendant of sizable wealth ...").

³⁵¹ See for example J M. Sylvester and R. D. Anderson, *Is It Still Possible to Litigate against Lloyd's in Federal Court?*, 34 Tort & Ins. L. J 1065, 1068 (1999) ("The Lloyd's enterprise is not an insurance company, but instead a self-regulating entity ...").

³⁵² See for example *Bonny v Lloyd's*, 3 F.3d 156, 158 n.2 (7th Cir. 1993), *cert. denied* 114 S. Ct. 1057 (1994); *Roby v Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 385 (1993). The notion is accurately rebutted at *Leslie v Lloyd's*, 1995 U.S. Dist. LEXIS 15380, *14:-

The Court considers unpersuasive any characterization of Lloyd's as roughly similar to the New York Stock Exchange ..., because this analogy ignores dramatic differences between the two institutions.

³⁵³ *Treasury Sel. Comm. I*, §72 on self-regulatory quality at Lloyd's:-

[P]art of the problem at Lloyd's was that a 20th century insurance market was still regulated and run upon the lines of a private club, in which difficulties were hushed up and solved behind closed doors.

³⁵⁴ *Financial Times*, September 4, 2000, *Reinsurance* supplement, p.IV ("Victorian pipework to be replaced"), quoting the Corporation's then CEO:-

"There is one fundamental distinction between Lloyd's and the London company market. Lloyd's is a single licensed, regulated entity with a brand name and a system of financial security. The London company market is a collection of companies represented by a trade association. Therefore, there is a lot of difference."

And see for example *Security at Lloyd's 2000*, unnumbered page beginning "Security is of paramount importance" (italics added):-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation.

And see recently for example the terminological error at Corporation press release LL12/00, February 12, 2000 ("Lloyd's announces new representative in Australia"), p.2 ("Lloyd's has traded in Australia since early in the last century. ... The business written by Lloyd's is predominantly property ...") — the Corporation has never sold property or other insurance in Australia.

³⁵⁵ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii ("If the Society were still a going concern"); *SOD*, p.135 ("If the Reconstruction and Renewal plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off").

³⁵⁶ See for example Lloyd's home insurance proposal form HIP(94):-

This is an application for insurance to be underwritten by certain Underwriters at Lloyd's of London. Lloyd's offers expertise: our tradition is to tailor and to innovate in order to meet our clients' needs. Lloyd's offers experience: virtually nothing is too large, too small, too complex, too simple or too new to cover Lloyd's offers security: 300 years of paying claims and a unique system of providing for future obligations makes the Lloyd's policy the safest that money can buy. Lloyd's Underwriters are leaders in the UK home insurance industry.

And see for example recent undated *Briefing Update* produced by the Corporation:-

Are you making a speech or presentation on Lloyd's? We may be able to help. Speaking opportunities at international / domestic conferences and other events provide an ideal platform to promote Lloyd's positively. Lloyd's marketing directorate can provide you with a full range of support including: Briefing notes and fact sheets Available on a range of topical issues. For further details please contact Timothy Yeardey:

"Lloyd's of London"³⁵⁹ and phrases such as "Lloyd's policy" and "Lloyd's policy-holder".³⁶⁰ The layman assured-at-Lloyd's may suppose that he is insured by rather than at Lloyd's. He will rarely know or ordinarily be told exactly which SYA participants sold him insurance, nor will their identity — almost entirely a back-office matter — ordinarily be material to the BO handling and paying of his claim;

(2) external insurance regulators often use the word "Lloyd's" *simpliciter* as error for SYA participants, and often treat its components as if they constituted one³⁶¹ single enterprise for the purpose of (for example) some solvency tests and some common-use claims securitisation devices. Credit rating agencies presently credit-rate the Lloyd's enterprise as a whole accordingly. The mere word "Lloyd's" or "Lloyd's of London", judiciously used by self-regulators-at-Lloyd's, to some extent conjures, and self-regulators'-at-Lloyd's blandishments and homogenated (or insufficiently differentiated) relevant figures³⁶² engender (presumably designedly) the mistaken belief in an homogenous claims securitisation fund and the notion (not necessarily mistaken) that "Lloyd's" pays claims out of its own personal funds.³⁶³

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³⁵⁷ See *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 78 (Bailhache J), quoting a promotional pamphlet issued by self-regulators-at-Lloyd's to prospective assureds-at-Lloyd's, which stated in part:-

"It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world."

See recently Corporation press release LL07/00, January 26, 2000 ("Lloyd's launches first ever advertising campaign"):-

The oldest name in insurance, Lloyd's of London, this week launches its first ever above-the-line advertising campaign. The London-based insurance market has initiated a six month campaign of print advertisements in UK and US financial and trade press While Lloyd's has advertised sporadically in the past, this move marks the first ever planned campaign by the market. ... Lloyd's specialises in high-risk and commercial insurance such as aircraft, shipping, political and war risks, e-commerce risks and personal accident. It is also the UK's largest motor insurer.

Note erroneous "It" in the last sentence. The Corporation does not sell motor or any other sort of insurance.

³⁵⁸ Cf. the INEX's practice of including a disclaimer.

³⁵⁹ See for example *Financial Times*, September 4, 2000, *Reinsurance* supplement (advertisement for "Lloyd's"):-

123 underwriting syndicates operate at Lloyd's of London. Within these distinct units, specialist expertise and entrepreneurial flair combine to deliver rapid solutions tailored to business needs. Together, the syndicates form a dynamic market that is a major power in world insurance. 75% of FTSE 100 companies and 64% of those in the Fortune Global 500 buy insurance at Lloyd's.

³⁶⁰ See for example Byelaw 7 of 1998, Sch. 2, §4(1).

³⁶¹ See for example, apparently, Prudential Guidance Note 1994/4 (November 1994) ("Guidance notes for applicants to carry on business in the United Kingdom"), §51(c) ("No single reinsurer (apart from Lloyd's) ...").

³⁶² See for example the insinuation of undedicated CU homogeneity at Corporation RA fye December 31, 2003, p.52 ('Security underlying policies issued at Lloyd's'). And see similarly in previous Corporation RAs.

³⁶³ Though technically erroneous (the Corporation does not personally pay claims), see *Lloyd's v Clementson* {2a} [1997] LRLR 175, 213 (Cresswell J):-

The continued success of Lloyd's depends inter alia upon its reputation and the security of its policy. One reason for the success of the Lloyd's market has been the security of the Lloyd's policy and the perception of that security. Lloyd's has never failed to pay a valid claim. This reputation is part of the foundation of Lloyd's success. Despite recent problems, Lloyd's continues to be well known among insurance clients for whom it is synonymous with security, reliability and innovation.

See also *Jaglom v Excess Insurance Co. Ltd.* [1971] 2 Lloyd's Rep. 171, 173, 178 (Donaldson J); *Eagle Star Insurance Company Ltd. v Spratt* [1971] 2 Lloyd's Rep. 116, 128 (Lord Denning MR), 129 (Megaw LJ).

(3) the generality of potential and actual assureds-at-Lloyd's can be expected to suppose that they are insured 100% at an insurance enterprise rather than x% by each and every relevant subscribing SYA participant *solus*, assuming he is at home and has the money available. Press phrases such as "Lloyd's profits" connote a common enterprise to the uninformed. That phrase is multiply misleading. Apparent insurance surpluses at Lloyd's accrue not to the Corporation but to individual SYA participants, and are not capable of properly arising in the first place — *a fortiori* as profit properly so called — until discharge of the underlying liability. Pending such discharge, SYA stamp 'profits' should be presumed to be merely a marketing and turnover application (and sometimes mis-application³⁶⁴) of reserves.

financial incidents of Membership

value

- 2.67 Membership *per se* has no intrinsic value³⁶⁵ — it is principally a self-regulatory jurisdictional device — and is financially pointless. Membership is not marketable³⁶⁶ or otherwise transferable. The point of underwriting Membership is to bring the Member within the Council's private, contractual, self-regulatory jurisdiction in order to, and then actually to, sell insurance solely as a principal and solely on his own account. No Member joins the Corporation in order to buy insurance from it (nor does the Corporation sell him any insurance), or to fund the Corporation's discharge of its own insurance liabilities to himself or to others (though a principal incident of selling insurance is that SYA participants do buy reinsurance³⁶⁷ from themselves and each other). The extent to which Membership involves contributing to a central fund in order to enable not the Corporation but SYA participants to discharge their own private insurance liabilities to themselves and others is considered elsewhere.³⁶⁸

contributories and basis of contributions generally

- 2.68 The Corporation — in any event not a Companies Act 1985, s.735 'company' — has no share (or other) capital or guarantee structure. There appears to be no measure³⁶⁹ exhaustively and unambiguously setting out its contributories. As a BO matter, no Member³⁷⁰ appears to be under any express liability — whether under its constitution (*viz.*, extant³⁷¹ Lloyd's Acts 1871-1982) or any other measure or instrument including Lloyd's Act 1982, s.6(2)³⁷² byelaw — to make any contribution

³⁶⁴ Draining reserves to be leached as false profit and false profit commission appears self-evidently to have been a feature of the Lloyd's enterprise before 1996.

³⁶⁵ The Rulebook at Lloyd's recognises that Membership may be pointless unless the Member underwrites: (*viz.*, in byelaw provisions providing for termination of Membership for not underwriting).

³⁶⁶ In *In the Matter of The Society Incorporated by Lloyd's Act 1871*, Cause No. 96-0050 CD, State of Indiana, Office of the Secretary of State, Securities Division, Administrative Complaint (August 26, 1996), §4, it was asserted that the Corporation "offered and sold Memberships in Lloyd's and participation in Lloyd's syndicates". Memberships are not bought or sold.

³⁶⁷ RTC is a different matter altogether: see, by way of introduction, the relevant parts of Appendix I. RTC is thoroughly treated in *Astor's Law of Lloyd's*, 2nd Ed.

³⁶⁸ See Chapter 3.

³⁶⁹ Cf. for example Insolvency Act 1986, s.226.

³⁷⁰ Presumably, absent some other more appropriate recipients, exclusively entitled to share in a net surplus on the Corporation's liquidation.

³⁷¹ *Viz.*, Lloyd's Acts 1871, 1911, 1951 and 1982.

³⁷² And see (the not-exhaustive) Lloyd's Act 1982, Sch. 2 (Purposes for which byelaws may be made; see formerly Lloyd's Act 1871, s.24). *Ibid.* does not empower the Council to promulgate a byelaw requiring

to any of the Corporation's own personal liabilities in any circumstances including a winding up. An insolvent Corporation's presumptive contributories are current Members (conceivably also past Members³⁷³), perhaps (logically) especially such of them as are already expressly liable to contribute to the Central Fund, which self-regulators-at-Lloyd's consider (query correctly) part of the Corporation's personal assets. Presumably the same political problems will arise in relation to corporate Members' discharge of the Corporation's personal liabilities as to their discharge of EquitasRe-reinsured liabilities.

to fund the Corporation's non-insurance debts

- 2.69** Neither Lloyd's Acts 1871-1982, the general law, nor the Rulebook-at-Lloyd's expressly requires any Member to discharge any of the Corporation's personal liabilities *per se*, however acquired. The Corporation's liability for own personal, properly³⁷⁴ assumed general trading debts, and for its own judicially³⁷⁵ imposed debts, is nowhere expressed to be limited or unlimited; *ditto* Members' liability (if any) to contribute to its personal assets to discharge those (or any other) Corporation debts. The Corporation's personal debts appear³⁷⁶ to be within the Council's express purported discretion to discharge. There is no express mechanism whereby Members agree to contribute to or guarantee the Corporation's personal liabilities. In principle, the Council can pass a byelaw which (assuming it survives a Lloyd's Act 1982, s.6(4) attack by Members in Corporation EGM) requires (or permits the requiring of) Members to make specified contributions to such debts. Query if the Council may properly promulgate a byelaw directly transposing the Corporation's personal unlimited financial liability to Members. In the event of the Corporation being unable to pay its debts out of its own personal assets, the Council would presumably order each relevant Member (absent a more appropriate source) — who does not expressly guarantee, and has no express liability to pay, those debts — to make a rationally assessed and properly quantified several-liability contribution to an appropriate fund appropriately governed.

the 'callable layer'

- 2.70** The Council has empowered itself to appropriate Members' BO PU funds. This interesting subject is outside the scope of the present Edition.³⁷⁷

assured's-at-Lloyd's recourse to Members

- 2.71** A distinction is to be drawn between the Corporation's rights against the individual Member as a directly liable contractual contributory and an assured's-at-Lloyd's

any Member to contribute in any event to the Corporation's assets in order to pay its personal liabilities. Such a byelaw would have to be carefully examined (presumably in the context of Lloyd's Act 1982, s.6(4)) if enough Members were alive to the subsection) for *vires* and good faith in the light of what the Council knew at relevant times about those assets and liabilities.

³⁷³ The Council appears to consider it has self-regulatory jurisdiction over former Members, *viz.*, persons with no apparent contractual connection to the Corporation. See incidentally Insolvency Act 1986, s.74 (liability as contributories of present and past members of company registered under the Companies Acts) and, presently no less remotely statutorily, *ibid.*, s.226 (Contributories in winding up of unregistered company).

³⁷⁴ Including in furtherance of its Lloyd's Act 1911, s.4 objects.

³⁷⁵ *Viz.*, if some relevant court adjudges the Corporation liable to make reparations to the descendants of slaves, to Members induced by the Corporation's fraud to participate at Lloyd's, or similar payments. Cf. Lloyd's Act 1982, s.14 exemption from having to pay damages in certain events.

³⁷⁶ See OCFB, §8.

³⁷⁷ See *Astor's Law of Lloyd's*, 2nd Ed.

rights against one or more Members on some theory of direct liability yet to be established. Query the basis on which, even if such theory were successful in principle, an individual corporate or natural Member's net liability to a particular claimant assured-at-Lloyd's is to be quantified. Presumably it would be an exercise, if separate from Central Fund contributions, to be done (if at all) centrally in relation to all Members on behalf of all relevant assureds-at-Lloyd's.

THE SYA PARTICIPANT

orientation

bottom line

- 2.72** In BBSN circumstances, the insolvency of a mere individual SYA participant has no bearing on the solvency — and thus the external insurance regulation and thus the financial viability — of the Lloyd's enterprise, nor the slightest relevance to any assured-at-Lloyd's. The Lloyd's enterprise would not be commercially, procedurally, administratively or practically viable in either BBSN or not-BBSN circumstances were the SYA-level separate contracts principle³⁷⁸ to be (or have to be) construed literally, as by any assured-at-Lloyd's (for example): (1) pre-contractually checking, or peri-contractually monitoring, any SYA participant's financial condition (the Lloyd's enterprise provides no incentive, encouragement or facilities, including through any Lloyd's broker, for him to do either; rating the FO creditworthiness of an individual SYA participant is pointless in BBSN circumstances, and too late in not-BBSN circumstances); (2) seeking to collect, or actually collecting, every or any part of his due claimium from the contracting SYA participant *solus*.

Member and SYA participant distinguished

- 2.73** The distinction is treated elsewhere.³⁷⁹

three other distinctions

- 2.74** Three distinctions are particularly required when considering the SYA participant: (1) the *originalis* vs. the conventional inward-RTCing. In BBSN circumstances, conventional RTC need have no FO effect since the presence of the *originalis* works equally well, whether or not he has been conventionally outward-RTCd, to enable the assured-at-Lloyd's to use him as a conduit to relevant MO and BO funds. There is thus no genuine FO dilemma of which conventionally RTCed or RTCing generation of SYA participants to sue in a collection suit. In the BO, conventional RTC appears to have some novatory effect³⁸⁰ in relation to all inward-RTCd liabilities not discharged from MO trust funds (in which event there is no need to obtain any fresh funds to discharge it); (2) as conduit³⁸¹ and as *solus*;³⁸² (3) in BBSN and not-BBSN circumstances.

relationship with assured-at-Lloyd's

- 2.75** In BBSN circumstances at Lloyd's, the SYA participant *solus*, whether *originalis* or any generation of conventionally inward-RTCing, is not in a direct collection relationship with any of his original or inward-acquired assureds-at-Lloyd's. This has numerous advantages:-

³⁷⁸ See ¶2.76.

³⁷⁹ See ¶2.52.

³⁸⁰ See Appendix I.

³⁸¹ See Chapter 4, Sub-Chapter 1.

³⁸² See ¶¶2.75, 2.83 *et seq.*

(1) no prospective assured-at-Lloyd's has any need to check, and no actual assured-at-Lloyd's has any need to monitor, the initial or continuing solvency of any SYA participant (assuming it were practicable to do so). Indeed, no component of the Lloyd's enterprise makes any express representation to any putative or actual assured-at-Lloyd's as to the financial security of any individual SYA participant, or invites, enables or facilitates the slightest inquiry on the point (including through any Lloyd's broker);

(2) The insulation is reciprocal. The assured-at-Lloyd's never recourses to or collects from any *solus*, and no *solus* ever has to pay, and never does pay, an assured-at-Lloyd's direct. The BO cash conveyor belt, and other relevant custom and practice, insulate the assured-at-Lloyd's and every relevant SYA-level *solus* from each other. Placing the assured-at-Lloyd's in any direct practical (*cf.* legal) relationship with any SYA participant may impede the smooth working, in BBSN circumstances, of the BO cash conveyor belt and complicate relevant payment procedures, especially if the assured-at-Lloyd's is both an inward and an outward reinsurer in relation to the SYA participant. The BO foundation of the arrangement in BBSN circumstances is SUA 1 / SCA 1 in conjunction with PTD-premium (the form of which the Corporation³⁸³ is required³⁸⁴ to approve), the PTF-premium being funded directly by the SYA participant and his various FAL, or by the Central Fund as PU float.³⁸⁵

(3) in an insolvency of a SYA participant, FO business proceeds as if nothing were amiss. No assured-at-Lloyd's is notified by any component of the Lloyd's enterprise, or need intervene in the insolvency process, and a multiplicity of disparate creditor disputes (perhaps in a number of jurisdictions) is wholly avoided.

the insurance contract: one or a bundle, and at what level?

- 2.76 Statute³⁸⁶ and common law³⁸⁷ appear to consider that the assured-at-Lloyd's contracts — the SYA-level united front, collectivisation and other relevant rules³⁸⁸ notwithstanding — at SYA participant level, *viz.*, he has a separate insurance contract with each subscribing SYA participant. In not-BBSN circumstances, operation

³⁸³ See LLD, §10.3.2R. The Corporation has no self-regulatory functions in its own right. Presumably error for the FSA (see formerly Insurance Companies Act 1982, s.83(2)), or for the Council, or a clumsy way of indicating that what the Council approves comes within the FSA's FSMA 2000, s.314(1) jurisdiction. In any event, the designation of the Corporation is legal and conceptual error.

³⁸⁴ See LLD, §10.3.2R *et seq.*

³⁸⁵ This considerable subject is outside this work's scope. It is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

³⁸⁶ Marine Insurance Act 1906, s.24(2): ('Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.'). And see *ibid.*, s.25(2) ('Where a policy is subscribed by or on behalf of two or more assurers each subscription unless the contrary is express constitutes a distinct contract with the assured.').

³⁸⁷ See (for example) *Arab Bank Plc v Zurich Insurance Co.* [1999] 1 Lloyd's Rep. 262, 277 (Rix J); *Napier & Ettrick v R. F. Kershaw Ltd.*, *Lloyd's v Woodard and Wilson* [1997] LRLR 1, 7 (Hobhouse LJ); *ibid.*, [1999] 1 WLR 756, 759-60 (Lord Steyn); *Barrington-Hume v AA Mutual International Insurance Co. Ltd.* [1996] LRLR 19, 22-23 (Clarke J); *Insurance Company v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 272, 274 (Colman J); *Aneco Reinsurance Underwriting Ltd. (in liquidation) v Johnson & Higgins Ltd.* [1998] 1 Lloyd's Rep. 565, 596 (Cresswell J); *Touche Ross & Co. v Baker* [1992] 2 Lloyd's Rep. 207, 209-210 (Lord Mustill); *The Zephyr* [1984] 1 Lloyd's Rep. 58, 66 (Hobhouse J; not affected on appeal); *General Reinsurance Corporation v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856, 864 (Kerr LJ); *Portavon Cinema Co Ltd v Price and Century Insurance Co. Ltd.* [1939] 65 Lloyd's List Law Reports 161, 166 (Branson J). And see in the companies market *Kingscroft Insurance Co. Ltd. v Nissan Fire & Marine Insurance Co. Ltd. (No. 2)* [1999] Lloyd's Rep. IR 603, 618 (Moore-Bick J).

³⁸⁸ On insurance contracts made at Lloyd's, see *Astor's Law of Lloyd's*, 2nd Ed.

of the doctrine may impose a considerable and wholly unnecessary logistical burden on the assured-at-Lloyd's if he has to prove his loss in relation to every subscribing SYA participant individually. In BBSN circumstances, there appears to be no need for the doctrine in relation either to inwards or outwards (*viz.*, outward re-insurance) coverage (where SYA-participant-level separate contracts are point-less³⁸⁹) or to collection (where such contracts are a gratuitous impediment to collection since³⁹⁰ the introduction of relevant MO and BO recourse in such circumstances³⁹¹). On the basis that the insurance contractual configuration ought to reflect that, in BBSN circumstances, the individual SYA participant as *solus* is irrelevant to the assured-at-Lloyd's in relation to both coverage and collection, at worst the assured-at-Lloyd's arguably has one insurance contract at stamp level (*viz.*, one contract between the assured-at-Lloyd's and *all* participants on the subscribing stamp, because FO-relevant deviations on a particular slip will never arise at SYA-participant level), and at 'best' he has one contract at slip level (*viz.*, one contract between the assured-at-Lloyd's and *all* participants on the "Lloyd's" slip, especially if all subscriptions are on substantially identical terms except lines). Any peculiar contractual stipulations which arise at stamp or slip level can be addressed in an actual or notional schedule to a single contract, and be evidenced in appropriate endorsements to a Lloyd's policy (if issued).

difference between natural and corporate SYA participant

- 2.77** The principal difference between the natural and corporate SYA participant is existence. Whereas a natural SYA participant, however dead, will tend to have personal representatives and others through whom his estate can be followed, a corporate SYA participant's dissolution leaves few suable traces. Once dissolved, the corporate SYA participant presumably cannot (including by legal fictions, restoration to the relevant register or procedural latitude) be a conduit to relevant claims payment securitisation trust funds. But dissolution does not discharge the insurance (or any other) contract to which the company was party. It is for such conduit reasons that self-regulators-at-Lloyd's are understood to object to the dissolution of corporate Members.³⁹² On the other hand, dissolved SYA participant's undischarged insurance contractual liabilities survive, remain within the responsibility (in that word's wider sense) of the Lloyd's enterprise, and are dischargeable by the Council under Lloyd's Act 1911, s.7(c), OCFB, and NCFB.

regulation of the SYA participant

- 2.78** As discussed elsewhere,³⁹³ regulatory anomalies arise in EU legislation directed to SYA participants collectively which do not arise in relation to the individual SYA participant.

³⁸⁹ See the interesting not unrelated point in the context of pools at *North Atlantic Insurance Co. Ltd. v Nationwide General Insurance Co. Ltd.* [2004] EWCA Civ 423 (CA).

³⁹⁰ Mackenzie Chalmers is excused because when Marine Insurance Act 1906 was at the drafting stage, there was no MO or BO recourse at Lloyd's, and recourse was indeed to every subscribing Member individually.

³⁹¹ There is no indication that judges in any of the cases cited above have considered how MO and BO recourse actually work at Lloyd's in such circumstances, including relevant MO instruments and SUA 1 / SCA 1 provisions setting out the SYA-level collectivisation rule.

³⁹² The problem may perhaps have a solution in the establishing of a single centrally administered corporate successor to dissolved corporate SYA participants. It is understood that self-regulators-at-Lloyd's have looked at this option.

³⁹³ See ¶2.7 etc.

liability and liabilities**severallness: SYA-level several liability: Lloyd's Act 1982, s.8(1)**

- 2.79 At SYA level (*cf.* Member level), the SYA participant is severally liable, not jointly or jointly-and-severally liable, for his own discrete, undivided, separate, distinct, unshared³⁹⁴ participation on a particular slip calculated according to his PIL deployment on the SYA. The rule appears to be breached when, in the absence of novation or other amendment, stamp survivors bear the liabilities of a departed SYA participant.³⁹⁵ Despite occurring at SYA level, reserving and re-reserving — arguably a form of sharing of liability — arguably does not amount to actual (*cf.* contingent) insurance contractual liability. The apparent tension³⁹⁶ between Lloyd's Act 1982, s.8(1) on the one hand and, on the other, EU and FSA solvency requirements for SYA participants (erroneously expressed as "members of Lloyd's") 'taken together' to have enough relevant assets to discharge all their insurance liabilities is apparently resolved to the extent that those requirements do not bear on the individual SYA participant's insurance contractual liabilities *per se*.

corporate SYA participant does not trade with limited liability

- 2.80 The notion that a corporate SYA participant sells insurance with limited liability (*cf.* a natural SYA participant's unlimited liability) is unfounded, as demonstrated when it becomes insolvent and is pursued to extinction by its creditors. On the most superficial examination, it will be discovered that both the natural and corporate SYA participant trade with identical types of liability. Like a natural SYA participant, a corporate SYA participant has no contractual right (*cf.* *Equitas Re*³⁹⁷) or legal privilege entitling it to reduce an assumed liability's quantum or otherwise protecting it from its full force (full-force protection devices³⁹⁸ are a different matter). The notion of 'limited liability' applies not to the corporate SYA participant but to its relevant contributories' statutory and contractual³⁹⁹ exposure.

reducing an insurance contractual liability

- 2.81 No proportionate payment plan, or any other privilege in relation to quantum of liability, inheres in any insurance contract made at Lloyd's.

the Corporation's relevance to liability

- 2.82 Lloyd's Act 1871, s.40 provides that the Corporation's mere incorporation does not confer limited liability on Members,⁴⁰⁰ or restrict any Member's liability for his own 'undertakings',⁴⁰¹ or make any Member 'as such' liable for any other Member's debts, or affect or interfere with or empower the Society or the Committee to inter-

³⁹⁴ The widespread notion that a SYA participant has a share in an insurance contract is misconceived. *Cf.* his share of the SYA stamp's expenses.

³⁹⁵ The mechanism for reconfiguring a stamp on the departure of one participant is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

³⁹⁶ Recognised at for example CP 16, §97.

³⁹⁷ RRC 4's proportionate cover plan is a novel device for reducing the quantum of a contracted liability: see Chapter 3.

³⁹⁸ For example, outward reinsurance; PSLI (and the now defunct high-level stop loss scheme operated at Lloyd's), etc.

³⁹⁹ As in the company's memorandum and articles of association.

⁴⁰⁰ A curious provision given that nothing in Lloyd's Act 1871 confers limited liability on the Corporation either.

⁴⁰¹ Presumably 'liabilities' is meant.

fere with any business whatever other than the business of insurance⁴⁰² carried on by any Member.

creditors

assured-at-Lloyd's

2.83 In BBSN circumstances, the assured-at-Lloyd's, aware (necessarily other than through official channels at Lloyd's), perhaps through Wilson-style public solicitation advertisements, of a relevant debtor SYA participant's personal (*cf.* the mere BO self-regulatory solvency test) insolvency arguably should forget about it. His BBSN recourse is never to any *solus* in the first place. No waiver or estoppel can adversely bind him in relation to an MO or BO claims payment securitisation fund expressly available to him in any event. His vigilance of and response to the SYA participant's personal financial position is rendered pointless by those funds' availability to him. He has no need to prove in relation to any of the SYA participant's free assets since any deficiency in a relevant MO or BO fund will automatically be remedied by relevant sources at Lloyd's.

2.84 In not-BBSN circumstances, where claims payment securitisation funds are likely to be seized, not supplemented (at least not immediately and in some cases not without litigation), and rationed, the unpaid valid-claimant SYA participant will obviously consider collecting against the *solus originalis*, however procedurally and financially absurd in the case of a poly-slip of traditional poly-stamps, even assuming that due diligence revealed sufficient free, identifiable, accessible, unencumbered assets in the hands of each solvent defendant available in principle in the first place. The defendant's own pursuit of conventionally inward-RTcing SYA participants, and conventional outward reinsurance, and other appropriate sources, is likely to add another layer of complexity. The assured-at-Lloyd's can, further or alternatively, strongly argue, on BO-contractual⁴⁰³ grounds, that the most recent conventionally inward-RTcing SYA participant is no less liable to him than any *originalis*. Presumably the Lloyd's enterprise's insolvency guardian will consider setting up a central agency, such as an AUA, to centrally perform the relevant financial calculations and effect relevant collection. Unlike the *Equitas Re* 'finality statement' exercise, the accounting must be done with absolute precision and the realised funds administered with strict regard to the exact state of every *solus*' relevant gross and net accounts (*cf.* *Equitas Re*'s agglomeration of *Equitas Re*-reinsured SYA participants' *Equitas Re* premiums⁴⁰⁴).

conventionally outward-RTced SYA participant

2.85 In BBSN circumstances, conventional RTC⁴⁰⁵ is (if unimpeachable to begin with) incapable of giving rise to liability of any conventionally inward-RTcing SYA participant to any conventionally outward-RTced SYA participant: among other things, the transaction renders it impossible in those circumstances for the latter ever to sustain any relevant loss either as a *solus* in the FO or as a SYA participant in the BO. In not-BBSN circumstances, or in bizarre BBSN circumstances, when the assured-at-Lloyd's seeks in the FO to collect from a conventionally outward-RTced *originalis*, the latter may then seek in the BO to claim on the RTC. It is an

⁴⁰² The original qualification 'marine' was deleted by Lloyd's Act 1911, s.5.

⁴⁰³ See the summary at Appendix I.

⁴⁰⁴ Discussed at *Astor's Equitas Re Handbook*.

⁴⁰⁵ See the summary at Appendix I. Conventional and other forms of RTC are discussed *in extenso* at *Astor's Law of Lloyd's*, 2nd Ed. A summary is at Part III of the article reproduced at Appendix I.

open question whether what is accepted universally at Lloyd's (in BBSN circumstances) solely as irrevocable BO extrication and irreversible reserving can at that point be transmuted into genuine reinsurance.

other BO creditors

- 2.86** Given the custom in BBSN circumstances that the assured-at-Lloyd's never recourses to the SYA participant *solus*, the actuality and contingency of a SYA participant's liability under an insurance contract to which he is a party — identical in principle to that of any conventional insurance company under one of its standard insurance contracts — is relevant principally (if not only) in relation to BO creditors. The SYA participant's obligations under BO instruments are beyond this work's scope.⁴⁰⁶

debtors: outward RTC

- 2.87** In BBSN circumstances: (1) conventional RTC⁴⁰⁷ is an irrevocable transfer of liability from conventionally outward-RTCd SYA participant to conventionally inward-RTCing SYA participant. The transaction has nothing substantively to do with reinsurance. In not-BBSN circumstances the transaction cannot practicably or fairly⁴⁰⁸ be transmuted into reinsurance. All references in conventional RTC contractual documentation to indemnity are misconceived. Conventional RTC irrevocably extricates the outward from the outward-RTCd liability (*cf.* EquitasRe-RTC, which is not RTC in that sense), and destroys the possibility that he will ever suffer a relevant insurable loss; (2) an assured-at-Lloyd's (presumably unaware of the particulars of BO transactions such as conventional RTC) may be in apparent privity with an outward but never collects in any way, at any level, from him either in the FO directly as *solus*, or indirectly against BO assets directly attributable to him. Rather, collection is automatically directed against the inward — the first level of recourse liable to discharge it — as conduit to relevant captive BO funds, or against the outward as conduit to relevant captive MO and or BO funds. The choice between the two appears to be partly a function of what relevant funds happen to be available at the relevant time.⁴⁰⁹
- 2.88** In not-BBSN circumstances, to the extent that BO and MO funds are not sufficiently available from the most recent conventionally inward-RTCing SYA participant conduit, and the conventionally outward-RTCd *originalis* then suffers what is properly construed as a loss under his conventional RTC contract — a relatively small amount in the case of each participant on a traditional poly-stamp on a poly-slip — he can then claim reimbursement only against the free, unencumbered, available assets of each (solvent or insolvent) contiguous conventionally inward-RTCing SYA participant *solus*, who may claim against each of his own conventionally inward-RTCing SYA participants, and so on. One risk subscribed by ten stamps each comprising thirty different SYA participants, and each of those stamps then initiating a chain of conventional outward-RTC to five consecutive contiguous stamps each comprising twenty different people, could — assuming the assured's-

⁴⁰⁶ They are discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁴⁰⁷ Discussed in detail at *Astor's Law of Lloyd's*, 2nd Ed. See the summary at this work, App. I.

⁴⁰⁸ The outward being able properly to claim that in the RTC premium he has already paid 100% of the envisaged loss. Irrevocable unconditional infiltration and extrication is inherent in conventional RTC. That argument does not work in relation to conventional outward reinsurance (such as sold by Equitas Re in RRC 4).

⁴⁰⁹ Discussed in detail at the usual source.

at-Lloyd's successful collection against each of three hundred *originales* — give rise to up to 26,000⁴¹⁰ collection suits (plus the necessity to do prior accounting, outward reinsurance, substantive and procedural coverage, and personal financial, due diligence in relation to each relevant defendant). Presumably the Lloyd's enterprise's insolvency guardian will find a more rational way to make sufficient payment to each assured-at-Lloyd's from financial sources which do not involve recourse to any *originalis solus* by disrupting the absolute irrevocable unconditional finality ordinarily conferred by conventional outward-RTC.

general insolvency principles

net losses at Lloyd's: pre-R&R folklore

- 2.89** *Per* pre-R&R folklore, aspirant 'Names' — including Members recruited from within the same family, such as both spouses — apparently believed themselves vouchsafed against net losses at Lloyd's by (for example) unimpeachable⁴¹¹ self-regulation ensuring (for example): (1) unimpeachable active underwriting⁴¹² by managing agencies (the quality of portfolio selection⁴¹³ by members' agencies equally appears to have escaped attention); (2) sufficient performing outward reinsurance from sources other than himself⁴¹⁴ (3) sufficient performing PSLI⁴¹⁵ from sources other than himself; (4) investment income and or 'cap app';⁴¹⁶ (5) tax relief (but only against taxable income). No doubt the less less-informed candidate would have added outward-RTC⁴¹⁷ and PSLI bought from himself. *In extremis*, at least the 'Name' would supposedly retain the double-used underlying asset such as his resi-

⁴¹⁰ *Viz.*, $(1 \times 20) \times 30 \times 10 =$ number of conventional outward-RTC contracts for original subscribers + $(1 \times 20) \times 20 \times 10 \times 5 =$ number of onward conventional outward-RTC contracts.

⁴¹¹ A classic example of self-regulators'-at-Lloyd's BO blandishing is General Meeting of Members of Lloyd's, Wednesday 26th June 1985; Statement by the then Chairman of Lloyd's, p.3-4:-

I now return to the general question which I have posed as to whether a member or prospective member of Lloyd's can trust the system which now regulates the market in which they participate - or, to put it more bluntly: "Could it happen to me?" At once I must start by saying that, trading as we do on the basis of individual and unlimited liability, there will always be, as there has always been, a possibility of financial disaster from underwriting losses. But surely at Lloyd's we deal in the risk of probabilities, rather than the risk of possibilities. ... I believe that the Council of Lloyd's has now evolved a regulatory system which is both appropriate to the modern day world and is also one in which the current members of Lloyd's and those seeking membership can fully place their trust. ... These measures I have listed and many other reforms add up, in my view, to a modern and efficient system of regulation in which Names may readily place their trust.

On the reality, see for example *Jaffray* {2a} [2000] CLC 725 (Cresswell J) and {2b} [2002] EWCA Civ. 1101 (CA); *Treasury Sel. Comm. 1*, etc. Members appear to be without a relevant remedy.

⁴¹² In reality, pre-R&R, the sale at Lloyd's of numerous insurance products did produce gross loss, both in the pure YA (often cyclically) and in conventional inward-RTC of certain portfolios. Conventional inward-RTC is not a mere reserving decision but a positive active underwriting decision.

⁴¹³ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 520 (Gatehouse J).

⁴¹⁴ in reality, some outward reinsurance did not perform, and much was placed with SYA participants, sometimes with the cedant himself as participant on a reinsurance SYA. The full extent of the outward self-reinsurance spiral at Lloyd's does not appear to have been investigated.

⁴¹⁵ On the other hand, selling PSLI had become irrational by the 1988 UY: see the results of relevant SYA stamps such as 134/184, and 387.

⁴¹⁶ At certain times, selling insurance was 'profitable' only after taking capital appreciation into account.

⁴¹⁷ Conventional outward-RTC has in reality been a device for compounding liability for the loyal-contiguous SYA participant buying conventional outward-RTC from himself (blind spots making it impossible for the Member to gauge the merits of loyal-contiguous 'syndicate' participation in the first place, and both members' and managing agencies pressurising him to be loyal-contiguous). Conventional RTC appears in many cases to have been simple fraud by managing agencies on their principals permitted and abetted — sometimes positively required — by the Council, and the conventional RTC device a licence by the Council to managing agencies to commit fraud on their principals. The true extent of under-reserving fraud by managing agencies on SYA participants has not been fully investigated.

dence.⁴¹⁸ That most of the listed foregoing are antidotal to gross *losses* does not appear to have put the prospective underwriting Member on inquiry. Various versions of the Verification Form attempted, with more⁴¹⁹ or less⁴²⁰ clarity and accuracy, to warn the candidate. Numerous natural Members appear to have been wholly uninformed or materially misinformed⁴²¹ of how the Lloyd's enterprise actually worked. Nor do self-regulators-at-Lloyd's appear to have warned prospective Members of the contributory incident of Membership (*cf.* financial incidents of SYA participation). By the second, post-*Deeny v Gooda Walker*⁴²² wave of BO litigation, many Members appear to have been on the verge of personal insolvency.⁴²³

orientation: creditors at Lloyd's; third-party creditors

- 2.90** In BBSN circumstances, the assured-at-Lloyd's may, if wholly misguided, wish to attempt to recourse directly against the relevant available assets of the insolvent SYA participant *solus* to satisfy payment of a particular claim on a particular insurance contract to which the latter is a subscriber. In not-BBSN circumstances, he may have to. Similarly, whatever the circumstances at Lloyd's, the SYA participant's insolvency guardian will wish to marshal all available assets.

transactions at undervalue

- 2.91** The broadly identical statutory provisions in relation to corporate⁴²⁴ and natural⁴²⁵ SYA participants — in administration⁴²⁶ or liquidation,⁴²⁷ and bankruptcy,⁴²⁸ respectively — enable the SYA participant's insolvency guardian to apply⁴²⁹ to the

⁴¹⁸ See for example Reg. Bn. 80/97 (August 14, 1997; 'Guarantees / letters of credit (LOCs) backed by principal private residences (PPRs)'), etc.

⁴¹⁹ See for example 1998 (undated) verification form, §(1): 'I understand that the underwriting of insurance can be a high risk business and losses can be made as well as profits. I also recognise that Lloyd's is a market and that risks and rewards vary from syndicate to syndicate, and from year to year.' '[Y]ear' is incoherent given the calendar year, UY, and SYA.

⁴²⁰ See for example the remarkable last page, 'I am satisfied with the briefing received from my underwriting agent(s) and their answers to my questions. I confirm there are no aspects of concern', recalling (as does the form in general) *Watts v Bucknall* [1903] 1 Ch. 766, 777 (Collins MR; '[L]arge print, little print, italics, red ink, and other attractive devices in other parts of the prospectus to lead the unwary from the true path of inquiry are only specimens of the art of deceiving, and an apparent candour may be a more potent engine of deception.').

⁴²¹ The opinionated ignorance of the founders of many of the pre-R&R action groups was particularly remarkable.

⁴²² *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183 (Phillips J).

⁴²³ See *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437, 459 (Bingham MR). *Cf.* the partial and misleading characterisation at *Corporate Participation 1997*, §2.5 (p.17):-

Names found themselves locked into loss making open years on which they continued to be exposed to deterioration in the results. These circumstances gave rise to much litigation within the market as Names sought to resolve their financial liabilities through the courts.

The actionable BO misconduct was not the deterioration *per se* but relevant BO misrepresentation and non-disclosure by relevant members' and managing agency personnel (on which see for example Kerr Panel and relevant cases listed at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J)), and by self-regulators-at-Lloyd's and the Corporation, on which see (for example) *Lloyd's v Jaffray* {2a} *cit.*, and *ibid.*, {2b} [2002] EWCA Civ. 1101 (CA).

⁴²⁴ See Insolvency Act 1986, s.238.

⁴²⁵ See Insolvency Act 1986, s.339.

⁴²⁶ See Insolvency Act 1986, s.238(1)(a) and *ibid.*, s.247(1).

⁴²⁷ See Insolvency Act 1986, s.238(1)(b) and *ibid.*, s.247(2).

⁴²⁸ See Insolvency Act 1986, s.339(1) and *ibid.*, s.381.

⁴²⁹ See Insolvency Act 1986, s.238(2) (company); *ibid.*, s.339(1) (natural person).

court⁴³⁰ for an order⁴³¹ setting aside⁴³² transactions made⁴³³ at an undervalue, *viz.* (so far as presently relevant), a gift (*viz.*, for no consideration)⁴³⁴ or a sale at significant undervalue.⁴³⁵ Under the heading 'Transactions defrauding creditors', the court has similar powers, at the instance of a wide constituency,⁴³⁶ where the corporate or natural debtor has made a transaction at an undervalue in order to prejudice actual or potential creditors.⁴³⁷ The statute does not distinguish between transactions done and not done by the insolvent through an agent. In BBSN circumstances, an assured-at-Lloyd's will never be a party to a SYA participant's personal insolvency process. The argument that a particular insurance contract or conventional inward-RTC contract was entered into by his managing agency at an undervalue⁴³⁸ arises in relation to such BO creditors as the managing agency who put him in that position.⁴³⁹ The court is prohibited from making any such order against a company if 'satisfied' that it was made in good faith for business purposes⁴⁴⁰ and that there were contemporaneous 'reasonable grounds' for 'believing'⁴⁴¹ that the transaction would 'benefit'⁴⁴² the company.⁴⁴³ These exceptions will safeguard from attack many SYA-level contracts — assuming the insolvent SYA participant descends to that level of detail — made by a corporate SYA participant's conscientious managing agency and or active underwriter.

preferences

2.92 The broadly identical statutory provisions in relation to corporate⁴⁴⁴ and natural⁴⁴⁵ SYA participants — in administration⁴⁴⁶ or liquidation,⁴⁴⁷ and bankruptcy,⁴⁴⁸ respectively — enable the SYA participant's insolvency guardian to apply⁴⁴⁹ to the court⁴⁵⁰ for an order⁴⁵¹ setting aside⁴⁵² a made⁴⁵³ 'preference', *viz.*: (1) a company:

⁴³⁰ See Insolvency Act 1986, s.385(1) (natural person).

⁴³¹ See generally Insolvency Act 1986, s.241 (company); *ibid.*, s.342 (natural person).

⁴³² See Insolvency Act 1986, s.238(3) (company); *ibid.*, s.339(2) (natural person).

⁴³³ On the time of making, see Insolvency Act 1986, s.240 (company); *ibid.*, s.341.

⁴³⁴ See Insolvency Act 1986, s.238(4)(a) (company); *ibid.*, s.339(3)(a) (natural person).

⁴³⁵ See Insolvency Act 1986, s.238(4)(b) (company); *ibid.*, s.339(3)(c) (natural person).

⁴³⁶ See Insolvency Act 1986, s.424.

⁴³⁷ See generally Insolvency Act 1986, ss.423-5.

⁴³⁸ Loss leading and other deliberate underchanging of premium is discussed at *Astor's Law of Lloyd's*, 2nd Ed. Much conventional RTC before R&R appears to have been done at a gross undervalue, it apparently having been managing agency practice to dissipate reserves to conventionally outward-RTCd SYA participants as false profit and false profit commission, infiltrating an ever larger parcel of liabilities to an increasingly financially weakened new SYA stamp.

⁴³⁹ See ¶2.109.

⁴⁴⁰ See Insolvency Act 1986, s.238(5)(a).

⁴⁴¹ Query whose belief governs, the company's or its agent's.

⁴⁴² Presumably financially rather than socially or morally.

⁴⁴³ See Insolvency Act 1986, s.238(5)(b).

⁴⁴⁴ See Insolvency Act 1986, s.239.

⁴⁴⁵ See Insolvency Act 1986, s.340.

⁴⁴⁶ See Insolvency Act 1986, s.238(1)(a) read with *ibid.*, s.239(1).

⁴⁴⁷ See Insolvency Act 1986, s.238(1)(b) read with *ibid.*, s.239(1).

⁴⁴⁸ See Insolvency Act 1986, s.340(1).

⁴⁴⁹ See Insolvency Act 1986, s.239(2)(company); *ibid.*, s.340(1) (natural person).

⁴⁵⁰ See Insolvency Act 1986, s.385(1) (natural person).

⁴⁵¹ See generally Insolvency Act 1986, s.241 (company); *ibid.*, s.342 (natural person).

doing something in relation to one of its own creditors, guarantors or sureties⁴⁵⁴ which has the effect of putting him in a position which, if the company goes into insolvent liquidation, will definitely be better than without it;⁴⁵⁵ (2) a natural person: doing something in relation to one of his own creditors,⁴⁵⁶ guarantors or sureties⁴⁵⁷ which has the effect of putting him in a position which, if becomes bankrupt, will definitely be better than without it.⁴⁵⁸ The court is prohibited from making any such order unless it finds that the company or natural person was influenced in deciding to give the preference by a desire to confer that effect.⁴⁵⁹ The statute does not distinguish between transactions done and not done by the insolvent through an agent. The insolvency guardian will principally examine the network of BO security given to the Corporation in the form of FAL. Capture of premium income by the PTF-premium, and levies paid to 'third-party' relevant dedicated and not-dedicated MO and BO claims payment securitisation trust funds (*cf.* payments made direct to particular creditors), may also attract interest. In the bizarre situation that a SYA participant makes any sort of payment direct to or has any other relevant dealings direct with an assured-at-Lloyd's, presumably that payment or dealing is vulnerable in the ordinary way.

classes

- 2.93** Assuming not-BBSN circumstances, where relevant assureds-at-Lloyd's have been drawn into the insolvency process of a SYA participant *solus*, the PTD-premium to some extent homogenises all relevant liabilities without the need to create classes or categories of assured-at-Lloyd's. Members of different classes must have segregable (though not necessarily different) interests.⁴⁶⁰ It is difficult to conceive of assureds-at-Lloyd's, however diverse, having different interests given the Lloyd's enterprise's blandishments — the contractual context in which the SYA participant does business — of homogeneous claims payment securitisation regardless of (for example) type of insurance product, syndicate, SYA, SYA stamp, SYA participant, managing agency, Lloyd's broker, outward reinsurer,⁴⁶¹ UY, YOR, inception year, or length of tail.⁴⁶² The availability only to certain assureds-at-Lloyd's of dedicated MO claims payment securitisation trust funds will complicate the picture.

self-regulation on insolvency

SMA 1, SSA 1, SMA 2

- 2.94** Under SMA 1, the members' agency may terminate the express contractual agency by forty-eight hours written notice to the so-called 'Name' if (among other things)

⁴⁵² See Insolvency Act 1986, s.239(3) (company); *ibid.*, s.340(2) (natural person).

⁴⁵³ On the time of making, see Insolvency Act 1986, s.240 (company); *ibid.*, s.341 (natural person).

⁴⁵⁴ See Insolvency Act 1986, s.239(4)(a).

⁴⁵⁵ See Insolvency Act 1986, s.239(4)(b).

⁴⁵⁶ See Insolvency Act 1986, s.383(1).

⁴⁵⁷ See Insolvency Act 1986, s.340(3)(a).

⁴⁵⁸ See Insolvency Act 1986, s.340(3)(b).

⁴⁵⁹ See Insolvency Act 1986, s.239(5) (company); *ibid.*, s.340(4) (natural person). And see the presumptions at, respectively, *ibid.*, ss. 239(6) and 340(5). On 'connected' and 'associate', see *ibid.*, s.249

⁴⁶⁰ *Sovereign Life Assurance Co. v Dodd* [1982] 2 QB 573 (CA).

⁴⁶¹ Self-regulators-at-Lloyd's qualifications concerning the availability of the Central Fund to EquitasRe-assureds-at-Lloyd's have all been made after the insurance was bought, not before.

⁴⁶² Although see *Re RMCA Reinsurance Ltd.* [1994] BCC 378 (Morritt J; long-tail assured capable of constituting a class).

the Name is unable to pay his debts as they fall due, or meet his commercial obligations as they arise.⁴⁶³ Under SSA 1, The members' agency is required to notify the managing agency forthwith of the bankruptcy of any of the former's Names.⁴⁶⁴ There are similar provisions in SMA 2 (in relation to the members' agency). The agency may terminate its appointment⁴⁶⁵ by not less than forty-eight hours written notice to the Member in any of the following events (among others): (1) he makes or proposes any composition with his creditors or otherwise acknowledges his insolvency;⁴⁶⁶ (2) he makes an application to the court for an Insolvency Act 1986, s.253 interim order (IVA);⁴⁶⁷ (3) a bankruptcy order is made against him by the due process of law of any country;⁴⁶⁸ (4) he is adjudicated bankrupt, or adjudicated or declared insolvent, by the due process of law of any country;⁴⁶⁹ (5) any event equivalent to any of the above occurs.⁴⁷⁰ SMA 2 also provides for the restoration to the Member's PTF-premium of the members' agency's relevant fees.⁴⁷¹

SUA 1 / SCA 1

- 2.95** SUA 1, §11.7⁴⁷² empowers each managing agency of each of the Member's SYA stamps to terminate SUA 1 on not less than 48 hours written notice — a power that each managing agency may choose to exercise differently, there being no relevant coordinating provision — in various insolvency-related events including (for example) if the SYA participant makes or proposes any composition with his creditors or otherwise acknowledges his insolvency;⁴⁷³ applies to the court for Insolvency Act 1986, s.253 order;⁴⁷⁴ if a bankruptcy order is made against him by the due process of law of any country;⁴⁷⁵ if he is adjudicated bankrupt, or adjudicated or declared insolvent, by the due process of law of any country;⁴⁷⁶ any action equivalent to any of the above is taken by or in respect of him.⁴⁷⁷ Mere SUA 1 automatic or elective termination does not involve novating any insurance contract already made, or otherwise extricating the insolvent SYA participant from his liabilities under it (query the relationship between profit and loss and underlying liability, which appears to continue). The managing agency retains contractual authority to run off the insolvent SYA participant's liabilities notwithstanding SUA 1's apparent termination for other purposes.⁴⁷⁸ When the managing agency does exercise its SUA 1, §11.7 power to terminate SCA 1, its 'authority'⁴⁷⁹ to 'accept risks' on behalf of the

⁴⁶³ SMA 1, §12(d)(ii).

⁴⁶⁴ SSA 1, §17(c).

⁴⁶⁵ In the case of SMA 2, subject to *ibid.*, §11.7: *ibid.*, §11.6.

⁴⁶⁶ SMA 2, §11.6(b)(i).

⁴⁶⁷ SMA 2, §11.6(b)(ii).

⁴⁶⁸ SMA 2, §11.6(b)(iii).

⁴⁶⁹ SMA 2, §11.6(b)(iv).

⁴⁷⁰ SMA 2, §11.6(b)(v).

⁴⁷¹ See SMA 2, §8.6.

⁴⁷² *Q.v.* it and SUA 1, §11.8 for detailed provisions.

⁴⁷³ SUA 1, §11.7(b)(i).

⁴⁷⁴ SUA 1, §11.7(b)(ii).

⁴⁷⁵ SUA 1, §11.7(b)(iii).

⁴⁷⁶ SUA 1, §11.7(b)(iv).

⁴⁷⁷ SUA 1, §11.7(b)(x).

⁴⁷⁸ See generally SUA 1, §11.8 *et seq.*

⁴⁷⁹ SUA 1, §11.8.

natural SYA participant also terminates,⁴⁸⁰ except in relation to (for example): (1) variations and extensions of existing risks effected under its 'customary and usual powers',⁴⁸¹ (2) inward-RTC.⁴⁸² SUA 1 provides⁴⁸³ for the managing agency's (necessarily SYA-specific) fee to be promptly refunded to the bankrupt SYA participant's PTF-premium, arguably⁴⁸⁴ regardless of when in the course of a SYA's lifespan the bankruptcy occurred. Notwithstanding SUA 1's termination, and the reapportionment of profit and loss, the managing agency's authority appears necessarily to continue for purposes of running off the insurance contracts to which the insolvent is and continues to be a party. For purposes of calculating the profit and loss of each participant on the relevant YA, the bankrupt SYA participant is automatically⁴⁸⁵ (whether or not the managing agency chooses to terminate SUA 1 for bankruptcy under *ibid.*, §11.7(b)) treated as having not participated on the SYA at all, his profit or loss (however large) being apportioned among the not-bankrupt survivors, who consent to the arrangement.⁴⁸⁶

external regulation on insolvency

Insolvency Proceedings Regulation; Reorganisation Directive

- 2.96** EU law expressly applying and not applying specifically to 'insurance undertakings' does not apply to the individual SYA participant. For example: (1) Insolvency Proceedings Regulation, which expressly⁴⁸⁷ excludes (though does not define) 'insurance undertakings' does apply to the insolvency of an individual (natural or⁴⁸⁸ corporate) SYA participant, the latter apparently⁴⁸⁹ not being an *ibid.*, §2 'insurance undertaking';⁴⁹⁰ (2) the Reorganisation Directive, which expressly⁴⁹¹ includes 'insurance undertakings', does not⁴⁹² apply to an individual SYA participant. The anomaly demonstrates yet another regulatory and functional dynamic — *cf.* FO,

⁴⁸⁰ See generally SUA 1, §11.8 *et seq.*

⁴⁸¹ SUA 1, §11.8(a). Relevant customs, usages and practices at Lloyd's are discussed in *Astor's Law of Lloyd's*, 2nd Ed.

⁴⁸² SUA 1, §11.8 (b); and see the further provisions on inward-RTC at *ibid.*, (c).

⁴⁸³ SUA 1, §6.3, *q.v.* for detailed provisions.

⁴⁸⁴ The word 'year' in SUA 1, §6.3's first sentence is incomprehensible. Is it a UY, a YOR (and if so which one), or some other sort of year? *Ibid.*'s §1.1 definition of 'year' is not dispositive.

⁴⁸⁵ See SUA 1, §14.2(a)'s words '(a) Subject to paragraphs (Byelaw 13 of 1990,) and (ab) of this clause, in the event of the death or bankruptcy of a member of the Managed Syndicate, or ... [etc.]'. *Ibid.*'s 'in the event of the membership of a member of the Managed Syndicate being terminated by operation of law or by virtue of the provisions of clause 11.7(b) of the relevant Managing Agent's Agreement otherwise than at the end of any year' are repetitious to the extent that termination under *ibid.*, §11.7 occurred because of bankruptcy: *ibid.*, 14.2(a) already applies.

⁴⁸⁶ SUA 1, §14.2(a) etc.

⁴⁸⁷ Insolvency Regulation, §2 (so far as presently relevant): 'This Regulation shall not apply to insolvency proceedings concerning insurance undertakings'

⁴⁸⁸ See for example Insolvency Proceedings Regulation, recital (9).

⁴⁸⁹ Absent a definition of 'insurance undertaking' in the regulation: the SYA participant is not an 'insurance undertaking' within First Non-Life Directive, §8.1(a) (especially including an 'association of underwriters known as Lloyd's') or First Non-Life Directive, §8.1(a) (*ditto*). And see Insolvency Proceedings Regulation, recital (9).

⁴⁹⁰ The regulation's provisions will be considered in a future Edition.

⁴⁹¹ See Reorganisation Directive, §1.1 read with *ibid.*, §2(a) read with First Non-Life Directive, §8.1(a) and First Life Directive, §8.1(a).

⁴⁹² Nor, incidentally, does Insurers (Reorganisation and Winding Up) Regulations 2003 (SI 2003/1102): see *ibid.*, §3, which expressly excludes the individual SYA participant (see FSMA 2000, s.316(1)(a)) and Members collectively (see FSMA 2000, s.316(1)(b)).

MO, BO dynamics; Member-level and SYA-level dynamics — affecting the SYA participant.

FSMA 2000, Part XXIV

- 2.97** FSMA 2000, Part XXIV provisions relating to an 'insurer' do not⁴⁹³ apply to a SYA participant, including otherwise relevant sections such as (for example) *ibid.*, s. 357⁴⁹⁴ (IVAs), *ibid.*, s.372⁴⁹⁵ (bankruptcy petition presented by FSA) and *ibid.*, s.377 ('Reducing the value of contracts instead of winding up').

special considerations for corporate SYA participant

- 2.98** Like a natural SYA participant, a corporate SYA participant is a FSMA 2000, s.19(1)(b) 'exempt person' in relation to Regulated Activities Order, §10 activities, and thus not subject to Insurers Administration Order, Insurers Winding-Up Rules or, as an "insurer", to any particular FSA intervention such as (for example) under FSMA 2000, s.360 ('Insurers'), s.365⁴⁹⁶ (voluntary winding up) or s.367⁴⁹⁷ (winding-up petitions), or under Insolvency Rules 1986, §2.12(1)(aa)⁴⁹⁸ (administration orders).

the insolvent SYA participant's assets

conduit assets

- 2.99** These are discussed elsewhere.⁴⁹⁹

the SYA participant's solus assets

- 2.100** What free assets the SYA participant may happen to have — including those liberated from his FAL⁵⁰⁰ — are a question for investigation in each case.

other assets: insolvent SYA participant's claims against others

insolvency guardian's due diligence

- 2.101** In the SYA participant's insolvency guardian's due diligence on all the insolvent's connections with, and rights against, each relevant component of the Lloyd's enterprise, the extent and variety of relevant actionable misconduct, and the number and variety of possible defendants, should not be underestimated.⁵⁰¹ PTD (general) 2002, Sch. 2 ('The trust fund') captures⁵⁰² relevant litigation recoveries, whose use

⁴⁹³ FSMA 2000, ss.360 and 19(1)(b) read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a) read with Regulated Activities Order, §13.

⁴⁹⁴ Because FSMA 2000, s.357(1) does not apply.

⁴⁹⁵ Because FSMA 2000, s.372(7)(a)-(b) do not apply.

⁴⁹⁶ Because FSMA 2000, s.365(1)(b) does not apply.

⁴⁹⁷ Because FSMA 2000, s.367(1)(a)-(c) do not apply.

⁴⁹⁸ Because a corporate SYA participant is not an "insurer".

⁴⁹⁹ See Chapter 4.

⁵⁰⁰ FAL, and release of assets therefrom, are discussed at *Astor's Law of Lloyd's*, 2nd Ed. On both matters, see generally (for example) Mkt. Bn. Y3156 (October 7, 2003; 'The membership and underwriting conditions and requirements (funds at Lloyd's) (M&URS)'); Mkt. Bn. Y2842 (July 25, 2002; 'Scottish limited partnerships (SLP), total release of funds at Lloyd's (FAL) procedure'); Mkt Bn. Y2804 (May 30, 2002; 'Nameco funds at Lloyd's (FAL) provided by way of interavailability'); Mkt Bn. Y2579 (July 11, 2001; 'Amendments to Funds At Lloyd's (FAL) total release procedure'), etc.

⁵⁰¹ See for example, pre-R&R, Kerr Panel Evaluation; cases listed at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J), Appendix 1.

⁵⁰² At (for example) *op. cit.*, §D; *q.v.* for detailed provisions.

to discharge PTD (general) 2002 'Permitted Trust Outgoings'⁵⁰³ — which comprise both SYA-level and Member-level liabilities — is assured.

against the Corporation for indemnity

- 2.102** The Corporation does not expressly indemnify any SYA participant against loss in his insurance business. Nor is mere Membership a vehicle for limiting that liability.⁵⁰⁴

injunctions concerning FAL drawdown; judicial review

- 2.103** Before R&R, various SYA participants applied, unsuccessfully,⁵⁰⁵ to negatively enjoin their respective own FAL's drawdown by trustees (subsequent disbursement of drawn-down FAL does not appear to have been in issue). Presumably a SYA participant's insolvency guardian would have no greater prospects of success. Any application by an assured-at-Lloyd's in BBSN circumstances for positive or negative injunctive relief against relevant PTF-premium trustees concerning FAL drawdown or disbursement would be absurd and appears never to have been made; *cf.* the assured's-at-Lloyd's accessing relevant PU and CU funds, discussed elsewhere. A judicial review application to uncover (among other things) the self-regulatory BO dynamics of cash calls, cash call statements and FAL drawdowns was robustly resisted by self-regulators-at-Lloyd's and failed.⁵⁰⁶

actionable self-regulatory infelicities

- 2.104** Of the tens of thousands who flocked, in pursuit of status,⁵⁰⁷ to join Lloyd's before R&R, pursuant to the Lloyd's enterprise's need⁵⁰⁸ to recruit Members in bulk, some may have been placed deliberately or recklessly under various misapprehensions as to the nature and quality of the venture they were about to undertake.⁵⁰⁹ Set pieces deployed by self-regulators-at-Lloyd's to evoke punctilious integrity in the minds of natural Members included (for example) the Verification Form, and the Rota Committee interview (at one point in which the members' agency's representative would be asked to step outside to enable the recruit to uninhibitedly interrogate the Council's representative). Also on the Council's self-avowedly vigilant watch (whether or not the recruitment process had actionable elements) were certain as-

⁵⁰³ See particularly PTD (general) 2002, Sch. 3.

⁵⁰⁴ Lloyd's Act 1871, s.40:-

Nothing in this Act shall confer limited liability on the members of the Society, or in any manner restrict the liability of any member thereof in respect of his individual undertakings, or make any member of the Society as such responsible in any manner for any of the undertakings, debts, or liabilities of any other member of the Society as such, or affect or interfere with or empower the Society or the Committee to interfere with any business whatever other than the business of insurance carried on by any member of the Society.

⁵⁰⁵ *Boobyer v David Holman Co. Ltd., and Lloyd's* [1993] 1 Lloyd's Rep. 96 (Saville J); and see the unsuccessful interlocutory application at *R v Lloyd's ex parte Briggs* [1992] COD 456 (QB Div. Ct.).

⁵⁰⁶ *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.). Self-regulators-at-Lloyd's gave a formal undertaking to Parliament during passage of what became Lloyd's Act 1982 that judicial review would definitely be available in relation to self-regulatory functions. In the event, self-regulators-at-Lloyd's, self-evidently, strenuously resisted the subsequent application in *Briggs*.

⁵⁰⁷ Recalling Charles Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* (Bentley, London, 1852), p.613 (Ch. 'Haunted Houses'): 'That any contrivance so clumsy could have deceived any body cannot fail to excite our wonder. But thus it always is. If two or three persons can only be found to take the lead in any absurdity, however great, there is sure to be plenty of imitators.'

⁵⁰⁸ By 1968: see *Cromer WP's* second term of reference ('... encourage a steady flow of new members').

⁵⁰⁹ See for example *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J); *ibid.* {2b} [2002] EWCA Civ. 1101 (CA).

pects of the enterprise apparently not wholly dissimilar to a Ponzi⁵¹⁰ scheme, executed at Member and SYA level, and involving both the BO and the FO, such as (for example): (1) at SYA level, certain managing agencies appear to have dissipated (already insufficient) reserves as false profit to the conventionally outward-RTCd stamp (the managing agency and supporting members' agencies taking 'profit commission'); (2) at SYA level, certain managing agencies appear to have then sought to recoup the dissipation by encouraging the outward stamp to participate in subsequent contiguous YAs of the same syndicate, and by recruiting fresh participants — including by citing to the latter the "syndicate's" apparent profitability — continuing the cycle of dissipation, profit commissions and marketing in the BO; (3) at Member level, Members' contributions to the Central Fund appear to have enabled the Council to remedy resulting SYA-level defaults; (4) a marketing image appears to have been engendered by self-regulators-at-Lloyd's, in the FO for actual and prospective assureds-at-Lloyd's, that the Lloyd's enterprise was solvent. That self-regulators-at-Lloyd's knew of the foregoing in intimate detail appears to be vouchsafed by their own self-avowedly sophisticated supervisory systems. The extent to which their conduct before R&R was actionable has recently been examined judicially in detail (see next paragraph). The edifice's increasing financial instability necessitated the R&R exercise. Its self-regulatory infelicities, observed by *Treasury Sel. Comm. 1*, have led to a measure of external regulation (FMSA 2000, Part XIX etc.).

2.105 Myth,⁵¹¹ judicial⁵¹² mischaracterisation and its own apparent⁵¹³ beliefs notwithstanding, the Corporation has no (inherent, express, implied or other) immunity from any suit from any quarter, Lloyd's Act 1982, s.14 conferring only an exemption from damages in certain circumstances; fraud is an express⁵¹⁴ exception. *Jaf-*

⁵¹⁰ *In re Ponzi*, 268 F. 997 (D. Mass 1920), 999-1000 (District Court, D. Massachusetts, November 12, 1920; 'So long as the current of money continued to flow in, he could pay the first investors with the receipts from the latter' — and see *Lowell v. Brown*, 280 F. 193, 196 (1922); *Cunningham v. Brown*, 265 U.S. 1 (1923); *Cunningham v. Comm'r of Banks*, 144 N.E. 447 (Mass. 1924)), recalling *Edgington v Fitzmaurice* (1889) 29 Ch.D. 459, 483 (Bowen LJ); *ibid.*, 480 (Cotton LJ; 'A man who lends money reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance it if he knows that it is not wanted to pay off liabilities already incurred.'). See similarly *North & South Insurance Corporation Ltd.* (1934) 47 Ll.L.R. 356, 357-8 (Maughan J). RRC 1 intervened before the Lloyd's enterprise's, and particular syndicates', Ponzi nature could be ascertained, especially the use of conventional RTC to under- and over-reserve and generate false profits and false profit commission. For a commonsense approach to institutional attempts to extract money, see Michael Banks in *Mary Poppins*. Upon the then chairman of Dawes, Tones, Mously, Grubbs Fidelity Fiduciary Bank at length obtaining twopence from him, he ejaculated, 'Give it back!'

⁵¹¹ The persistent myth that Lloyd's Act 1982, s.14 confers immunity from suit on any component of the Lloyd's enterprise appears to be derived (in part) from (for example): (1) misconstruction of *ibid.*'s plain words; (2) sloppy judicial misuse of the word 'immunity'; (3) *Fisher WP*'s Bill, clause 10 (see for example *Fisher WP*, p.33 *et seq.*; *ibid.*, App. 6 (p.168)); (4) the Lloyd's Bill as originally submitted, clause 11. The immunity in clause 11 was deleted in the re-submitted Bill: see *op. cit.*, clause 14. Clause 14 was eventually enacted without further amendment as Lloyd's Act 1982, s.14 on the express understanding, in the event somewhat misplaced (see *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176 (QB Div. Ct.); the application was (contrary to express representations made to Parliament on behalf of the Corporation during the passage of what became Lloyd's Act 1982, s.14) strenuously opposed by self-regulators-at-Lloyd's — that judicial review would definitely be available against self-regulators-at-Lloyd's.

⁵¹² See recently for example *Lloyd's v Bowman* [2003] EWCA Civ 1886, [2003] All ER (D) 393 (Dec) (CA), §15 ('immunity from liability to damages'); *Everard v Lloyd's* [2003] EWHC 1890 (Laddie J), §8 ("immunity given to Lloyd's under the Lloyd's Act"); §13 ('[the Corporation] relied upon the immunity given to it by ... s14(3) of the Lloyd's Act'); §§14, 19.

⁵¹³ See for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 246 (Cresswell J); *Lloyd's v Clementson* {1b} [1995] LRLR 307 (Saville J; CA).

⁵¹⁴ Lloyd's Act 1982, s.14(3)(i).

fray v Lloyd's {2}⁵¹⁵ is characterised by comprehensive failure to prove relevant fraudulent self-regulatory misconduct to the satisfaction of an English court. Further relevant fraud litigation in England is unlikely.⁵¹⁶ (In the State Agreement, US state securities regulators promise the Corporation to give no assistance to any private person seeking to pursue 'any action' against it.⁵¹⁷) The SYA participant's insolvency guardian, in considering litigation against relevant self-regulatory components of the Lloyd's enterprise, may perceive himself at somewhat of a disadvantage.⁵¹⁸

actionable portfolio selection by members' agency

- 2.106** That members' agencies which survived R&R undiscredited may have since sought to discharge their relevant contractual⁵¹⁹ and common-law portfolio selection functions and obligations more responsibly than hitherto will not dissuade the SYA participant's insolvency guardian from wishing to correlate his genuine (*cf.* affected) means, circumstances and best interests to each of his actual⁵²⁰ SYAs and deployed PILs. There is nothing to stop the Member from suing his own members' agency for cause.⁵²¹ That a Member is passive in relation to portfolio selection is irrelevant to the need for the members' agency to obtain his informed consent before obtaining his agreement to a portfolio.⁵²² A principal issue in an action for not-remote⁵²³ damages for portfolio selection⁵²⁴ is not that the insurance product's

⁵¹⁵ *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J); appeal dismissed at [2002] EWCA Civ. 1101 (CA) — notwithstanding what appeared to be a strong case.

⁵¹⁶ See for example *Laws v Lloyd's*, December 19, 2003 (CA).

⁵¹⁷ State Agreement, Art. 4(B)(5):-

Provided Lloyd's is not in breach of its obligations under this Agreement, and subject to the provisions of Article 2(C) above, no State Securities Regulator shall assist any private person or entity who seeks to pursue any action against Lloyd's or any of the persons to be released under the R&R Settlement Agreement, provided however that nothing in this sub-paragraph shall apply to requests or directives from any judicial or other governmental authority for any assistance or participation in any private lawsuit; and provided further that nothing in this Agreement shall apply to that portion of any private litigation in which forum selection is at issue.

Per ibid., Art. 2(C):-

Nothing in this Agreement shall be deemed to prohibit any State from responding to proper requests under Freedom of Information Act statutes or similar state governmental records statutes

Query the extent to which this provision arises from US state securities regulators coming into possession of information which might materially assist a relevant Member.

⁵¹⁸ See *Penrose*, 551.

⁵¹⁹ See for example SMA 2, §4(a), (b), (n); *ibid.*, §6.2(a), (m), etc.

⁵²⁰ See *P&B Run-Off Ltd. v Woolley* [2001] 1 All ER (Comm) 1120 (Andrew Smith J); [2002] Lloyd's Rep. IR 344; [2002] EWCA Civ. 65 (CA).

⁵²¹ See *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426, 486 (Morison J).

⁵²² *Brown v KMR Services Ltd.*, *Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 520 (Gatehouse J). *Cf.* the converse at *ibid.*, [1995] 2 Lloyd's Rep. 513, 551 (Hobhouse LJ).

⁵²³ See *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513, 556-7 (Hobhouse LJ, distinguishing *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.* [1949] 2 KB 528; and see *ibid.*, 542, Stuart-Smith LJ and 521, Gatehouse J), citing (among others) *Banque Bruxelles Lambert v Eagle Star Insurance Co. Ltd.* [1995] 2 WLR 607, 620 (Bingham MR), and *H. Parsons (Livestock) Ltd. v Uttley Ingham & Co. Ltd.* [1977] 2 Lloyd's Rep. 522 (CA).

⁵²⁴ A full discussion is outside the scope of the present work. It is discussed at *Astor's Law of Lloyd's*, 2nd Ed. Duties of members' agencies have been considered in (for example) *Fisher WP*, (see for example *ibid.*, §9.09; *Neill* (see for example *ibid.*, §5.21-5.22), *Walker CR* (in the context of participation on LMX spiral SYAs: see for example *ibid.*, §§4.2, 7.12), numerous BO missives from self-regulators-at-Lloyd's, and in *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513 (CA) and *Brown v KMR Services Ltd.*, *Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 517 (Gatehouse J).

risk⁵²⁵ category was notorious or inherently objectionable but that the SYA participant did not know its true risk category or (if he did) he did not agree to be subjected to it.⁵²⁶

2.107 The court will examine what specific information and advice the putative SYA participant ought properly to have received from the defendant members' agency — and relevant personnel thereof personally — and what he would then have done with that advice,⁵²⁷ not overlooking his responsibility to himself to ask the right questions.⁵²⁸ Where the evidence in a "high risk"⁵²⁹ case is that the claimant would have allocated some PIL to an unspecified, generically "high risk" SYA⁵³⁰ notwithstanding proper advice,⁵³¹ the court will then examine how much annual OPIL would have been so allocated,⁵³² and might conclude both that he would have followed the market average exposure to "high risk" SYAs (as established by expert evidence⁵³³), and that such exposure constituted a "prudent level".⁵³⁴ If the SYA participant succeeds in establishing a right to damages for actionable portfolio selection, there may be intricate set-off issues.⁵³⁵

2.108 Representations⁵³⁶ by self-regulators-at-Lloyd's and common acceptance⁵³⁷ notwithstanding, there appears to be little logic in the notion that 'spread' (a popular, ill-

⁵²⁵ The Wilshaw 'low', 'medium', and 'high' labels are not dispositive: see *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 520 (Gatehouse J; "Even syndicates customarily regarded as "safe" or lower-risk can suffer quite substantial losses").

⁵²⁶ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513. And see *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183, 197 (Phillips J).

⁵²⁷ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 553-4 (Hobhouse LJ).

⁵²⁸ Gatehouse J found curious Brown's omission to ask one of his members' agents the meaning of the phrase "excess of loss", when that phrase was apparently new to him ("It was an obvious question, if the information caused him concern").

⁵²⁹ The court may hypothesise that if due warning had been given, the Member would still have participated to some extent in the complained-of SYAs: see *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513; Stuart-Smith LJ (541-2) and Hobhouse LJ (554-5) (*cf.* at first instance, Gatehouse J [1995] 2 Lloyd's Rep. 513, 529).

⁵³⁰ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 554 (Hobhouse LJ), unsatisfactory because it appears to assume that all "high risk" SYAs are alike, without considering what made LMX spiral business peculiarly "high risk".

⁵³¹ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513 (a case about LMX spiral SYAs) is an unsatisfactory case to the extent that the crucial component in "proper advice" seems to have been, according to both parties and the judges, simply that the target LMX spiral SYAs could have produced "large losses": see for example *ibid.*, 538-9. This alone is unlikely to constitute "proper advice".

⁵³² *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 554-5 (Hobhouse LJ).

⁵³³ The court may take into account the level of exposure to "high risk" SYAs among insiders: *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 554.

⁵³⁴ *Brown v KMR Services Ltd., Sword-Daniels v Pitel* [1995] 2 Lloyd's Rep. 513, 554-5 (Hobhouse LJ). "Prudent" in the case of an LMX spiral SYA may be a contradiction in terms. Presumably a genuinely "prudent level" will also take into account how much the Name can afford to lose (the size of his reserves is relevant) if the SYA loses money: *ibid.*, 554.

⁵³⁵ See for example *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513, 555 (Hobhouse LJ; see *ibid.*, 542-3, Stuart-Smith LJ for a minority dissent; and *ibid.*, 529, Gatehouse J), citing *Westdeutsche Landesbank v The London Borough of Islington* [1993] 2 Bank. LR 159. On netting off good years against bad years, see *McMahon and Smith v AGF Holdings (UK) Ltd.* [1997] LRLR 159 (Lightman J). SYA expenses notionally saved are not recoverable: *Brown v KMR Services Ltd.* [1995] 2 Lloyd's Rep. 513, 548 (Hobhouse LJ).

⁵³⁶ See the implication at for example March 15, 1994 "Memorandum submitted by Lloyd's of London" at *MPs' Interests*, p.1, §4 ("A Name is ... able to allocate ... underwriting capacity between various syndicates so as to achieve a spread of underwriting risk ...").

defined notion in the portfolio selection context) reduces risk. Conversely, the notion of chasing apparent losses by participating loyally on contiguous YAs of a particular syndicate (a practice much encouraged by members' and managing agencies before R&R), though accorded judicial respectability⁵³⁸ and notwithstanding scientifically analysed cyclicity,⁵³⁹ has virtually no logical or other merit.⁵⁴⁰

actionable underwriting by managing agency

- 2.109** The SYA participant's insolvency guardian will similarly need to investigate⁵⁴¹ relevant actionable misconduct by a managing agency (a considerable subject outside this work's scope⁵⁴²): selling insurance at Lloyd's with unlimited liability — which natural *and* corporate SYA participants both do without the slightest difference between them on the point — is not a licence to the managing agency to commit actionable misconduct.⁵⁴³ Issues will include causation,⁵⁴⁴ recoverability,⁵⁴⁵ future underwriting losses,⁵⁴⁶ general measure,⁵⁴⁷ quantum,⁵⁴⁸ non-performing outward reinsurance,⁵⁴⁹ set-off⁵⁵⁰ and defences.⁵⁵¹

⁵³⁷ For a neutral statement which was probably intended to suggest that spread is in itself beneficial, see for example *MPs' Interests*, p.vi, §9 ("[T]he principal aim of [a] MAPA is to provide underwriting members of Lloyd's ... with the opportunity to participate on a wide spread of insurance syndicates and thereby to spread their risk"). Note the inaccurate use of "syndicates".

⁵³⁸ See for example *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183, 197 (Phillips J). The notion of an acceptable range of loss, and therefore a self-imposed cap on their recoverable damages (at any rate in relation to loss resulting from insufficient vertical reinsurance cover), was volunteered by the plaintiff Members in *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310, 314-5 (Langley J).

⁵³⁹ See for example *Corporate Participation 1997*, §5.3; *ibid.*, p.25 ('[P]articipating in the Lloyd's market should be viewed as being a long term commitment in an industry with pronounced cycles'); *Cromer WP*, §31, 32, 37;

⁵⁴⁰ The possible commercial expedient of conducting business in an 'ongoing' manner between contiguous YAs of a particular syndicate — see for example *Deeny v Gooda Walker Ltd.* {3} [1996] LRLR 183, 197 (Phillips J) — does not mean that any Member need be part of that process. *Cf. Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426, 483 (Morison J).

⁵⁴¹ Absent a close connection between managing agency and SYA participant, such as in an ILV, or where the SYA participant is personally connected (by employment or otherwise) to the managing agency, the YA participant ad his insolvency guardian will rarely if ever become aware of — least of all, routinely, from the managing agency itself — actionable underwriting. Nor will the SYA stamp's audited results necessarily hint at any net-relevant lack of contractual fiduciarity (see for example *SUA 1 / SCA 1*, §4.2) or of contractual (See for example *SUA 1 / SCA 1*, §4.2(a)) or common-law skill or care. Self-regulators-at-Lloyd's do not require the managing agency to so disclose in any prescribed missives from it to the SYA participant, such as a cash call statement or syndicate annual report.

⁵⁴² It is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁵⁴³ See for example *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437, 445 (Phillips J):-

The fact that a name who joins Lloyd's deliberately agrees to expose himself to unlimited liability does not mean that he anticipates or accepts that when he joins a syndicate the active underwriter will deliberately expose him to the risk of such liability. On the contrary, the name will reasonably expect the underwriter to exercise due skill and care to prevent him from suffering losses.

⁵⁴⁴ See for example *Deeny v Gooda Walker* {3} [1996] LRLR 183 (Phillips J); *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J).

⁵⁴⁵ See for example *Deeny v Gooda Walker* [1994] CLC 1224 (Phillips J); *Deeny v Gooda Walker* {3} [1995] CLC 437 (Phillips J); *Deeny v Gooda Walker* {7} [1995] 1 WLR 1206 (Phillips J); *Deeny v Gooda Walker* {8} [1996] LRLR 168 (Phillips J); *Aiken v Stewart Wrightson Members Agency Ltd.* {2b} [1996] 2 Lloyd's Rep. 577 (CA); *Arbuthnott v Feltrim Underwriting Agencies (in liquidation) (No. 3)* [1996] CLC 714 (Longmore J); *Henderson v Merrett Syndicates Ltd. and Ernst & Whinney (No. 2)* {3} [1997] LRLR 247 (Cresswell J).

⁵⁴⁶ See for example *Deeny v Gooda Walker* {7} [1995] 1 WLR 1206 (Phillips J). And see (in the context of portfolio selection) *Brown v KMR Services Ltd.* [1994] 3 All ER 385 (Gatehouse J).

⁵⁴⁷ See for example *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1995] CLC 437 (Phillips J); *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J); *Deeny v Gooda*

SYA

*orientation***generally**

- 2.110** A SYA⁵⁵² is not an unregistered or any other sort of company. Analogous to an egg tray, or, gestationally, a bud on a tree, it is an unincorporated incorporeal collectivisation device rather than a time period, usually⁵⁵³ deployed every UY by a managing agency in relation to each syndicate in its stable, enabling (in the case of a poly-stamp) underwriting Members to conduct insurance business collectively. It is singular that the simple term 'syndicate year of account' is not widely used self-regulatorily or external-insurance-regulatorily. The FSA attempts to use the novel term "syndicate year"⁵⁵⁴ (and similarly "syndicate period"). Utilising PIL *via* a YA is the only way in which an underwriting Member is self-regulatorily permitted to sell insurance. Participants on YAs of the same particular syndicate traditionally, and fancifully,⁵⁵⁵ consider themselves members of "the syndicate". Though collegial, including for set-off calculations, and somewhat fostered self-regulatorily (*viz.*, in SUA 1 / SCA 1,⁵⁵⁶ and the infelicitously named 'syndicate annual meeting') and by the managing agency for political purposes, the concept — reinforced by the tradition of an underwriting Member (traditionally at the members' agency's prompting) loyally deploying PIL on contiguous YAs of the same syndicate.

trading

- 2.111** A SYA has no assets or liabilities (including liabilities capable of being run off), does not trade, does not sell or buy insurance, does not have accounts, and does not buy or sell RTC.

insolvency impossible

- 2.112** With the sole exception of a SYA stamp comprising a spoastic SYA participant, a SYA stamp is incapable of ever becoming insolvent. Even if every participant on a particular SYA became insolvent, a SYA stamp is not capable of being afflicted.⁵⁵⁷

Walker {3} [1996] LRLR 183 (Phillips J); *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J).

⁵⁴⁸ See for example *Deeny v Gooda Walker* {3} [1996] LRLR 183 (Phillips J); *Deeny v Gooda Walker* {8} [1996] LRLR 168, 170 (Phillips J); *Wynniatt-Husey v R.J. Bromley (Underwriting Agencies) Plc* [1996] LRLR 310 (Langley J); *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J).

⁵⁴⁹ See for example *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426, 485 (Morison J); *Arbuthnott v Feltrim Underwriting Agencies Ltd* [1995] CLC 437, 491 (Phillips J).

⁵⁵⁰ See for example *Aiken v Stewart Wrightson Members Agency Ltd.* {1} [1995] 2 Lloyd's Rep. 618 (Potter J); *Deeny v Gooda Walker* {3} [1996] LRLR 183 (Phillips J); *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J); *Arbuthnott v Feltrim Underwriting Agencies (in liquidation) (No. 3)* [1996] CLC 714 (Longmore J).

⁵⁵¹ See for example *Berriman v Rose Thompson Young (Underwriting) Ltd.* [1996] LRLR 426 (Morison J); *Deeny v Gooda Walker* {3} [1996] LRLR 183 (Phillips J); *Cohen v David Holman & Co.* [1996] LRLR 387 (Morison J).

⁵⁵² Extensively discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁵⁵³ *Cf.* the Pepper Proposition.

⁵⁵⁴ See FSA Glossary, LLD, etc.

⁵⁵⁵ A syndicate is incapable of having members or participants.

⁵⁵⁶ See SUA 1 / SCA 1, §1.2(a)(i).

⁵⁵⁷ A full discussion is at *Astor's Law of Lloyd's*, 2nd Ed.

SYNDICATE

run-off

- 2.113** The popular notion⁵⁵⁸ of a syndicate being in run-off will usually be, on examination, a fallacy based on a terminological error. The colloquialism means: (1) the syndicate has stopped budding YAs and has become sterile; or (2) the consolidated accounts of the participants on at least one of the syndicate's YAs — said to be 'in run-off' (*cf.* 'closed', or naturally open) — have not been propitiously closed⁵⁵⁹ by conventional or other relevant RTC, and their liabilities (whether or not the SYA stamp's accounts happen to be 'in run-off') are being autologously run off (*cf.* being run off as part of the accounts of another stamp or a company such as Centrewrite or Equitas Re).

not a SYA or SYA stamp

- 2.114** The pandemic practice⁵⁶⁰ of using the word 'syndicate' to mis-describe participants on a particular SYA suggests fundamental misunderstanding of the course of insurance business at Lloyd's. In particular, the FSA's derivative⁵⁶¹ notion⁵⁶² of a 'syndicate'⁵⁶³ indicates, and fosters, multiple misunderstanding of: (1) SYA dynamics: the (in the case of a poly-stamp) collectivisation device is the SYA, not the syndicate (*cf.* such syndicates other than at Lloyd's as do not use years of account); (2) relevant self-regulation at Lloyd's: the 'syndicate number' identifies each and *all* the YAs of a particular syndicate, infelicitously indiscriminate regulatorily and terminologically as between both YAs of a particular syndicate and the particular UYs in which particular syndicates bud YAs. In alluding to 'one or more persons' without SYA or UY specificity (aggravated by the attempt to use the bogus term 'syndicate

⁵⁵⁸ See for example *Plan of action*, by the Corporation's then 'project director of open years and run-off management' in *Lloyd's — strategies for run-off* (pub. run off business, undated, apparently a supplement to the Spring 2003 issue) p.8 ('With the run-off guidelines, we have commenced a programme of issuing practical guidance on all the key issues facing syndicates in run-off').

⁵⁵⁹ The SYA stamp's accounts are 'in run-off'; *cf.* 'closed'.

⁵⁶⁰ The practice is discussed at *Astor's Law of Lloyd's*, 2nd Ed. One example here will suffice to illustrate both the practice and its pervasiveness, *viz.*, at *Re Yorke (deceased)*; *Stone and another v Chataway* [1997] 4 All ER 907 (Lindsay J):-

As to the position of names, I have received evidence, none of which has been challenged, from Mr William David Robson, a director and the chairman of Anton Jardine Members Agency Ltd, a leading Lloyd's members' agent; he has been involved in the Lloyd's market since 1963. He is chairman of the Lloyd's Underwriting Agents' Association. He explains that each individual member of a syndicate, names such as Mr Yorke, agrees to assume a proportion of the risks underwritten by that syndicate.

The use of 'syndicate' in the last sentence of the above quote is incoherent (it does not appear to be an excessively demanding intellectual or linguistic proposition that an underwriting Member is severally liable for his own insurance business carried out as a participant on a particular SYA). See similarly *ibid.*: 'Each syndicate is, in a sense, an annual venture; it exists for a year of account'. A syndicate is not an annual venture, and does not exist for a YA (a collectivisation device, not a time period) but persists for a potentially unlimited number of YORs.

⁵⁶¹ See also *Halsbury's Laws*, 4th ed. (2003 re-issue), vol. 25 ('Insurance'), §24 (p.26): 'It is usual for underwriters to associate themselves for business purposes into syndicates. One of the members of the syndicate takes the active part in the business ...', multiply and egregiously erroneous because (for example): (1) it is compulsory, not usual, for underwriting Members to deploy PIL onto SYAs; (2) it is impossible to deploy PIL onto, or participate in, a syndicate; (3) a SYA stamp's active underwriter is not a member of a syndicate, and is no longer (self-regulatorily) required to deploy PIL of his own onto the SYA for whose stamp he actively underwrites.

⁵⁶² See 'syndicate' as defined at (for example) FSA Glossary and Regulated Activities Order, §3(1) (in each case): 'one or more persons, to whom a particular syndicate number has been assigned by or under the authority of the Council of Lloyd's, carrying out or effecting contracts of insurance written at Lloyd's'.

⁵⁶³ See the extensive discussion at *Astor's Law of Lloyd's*, 2nd Ed.

year'⁵⁶⁴), the FSA Glossary definition — like that in the Rulebook-at-Lloyd's — fosters the misconceived notions that a syndicate is a collectivisation device and has participants, and or that poly-stamps of a syndicate's contiguous YAs are necessarily identical. However coincidental a Member's participation between contiguous YAs of a particular syndicate, each poly-stamp of a particular syndicate is a wholly separate collectivity, and each mono-stamp of a particular syndicate a distinct undertaking. In all such matters, the syndicate is merely the conceptual integument.

insolvency of a syndicate

- 2.115** A syndicate is incapable of ever becoming insolvent.⁵⁶⁵ A syndicate has no legal personality — it is not an unregistered or any other sort of company or association — and has no assets, liabilities (including any capable of being run off) or accounts, does not trade, does not sell or buy insurance or RTC, and never goes into run-off. A syndicate, which may be analogised to a type of tree, is a managing agency's mere entrepreneurial idea and unincorporated incorporeal entrepreneurial marketing device — both FO (to actual and potential assureds-at-Lloyd's) and BO (to actual and potential SYA participants) — and a self-regulatory device enabling self-regulators-at-Lloyd's to both regulate various aspects of the managing agency's agency conduct and identify (often misleadingly⁵⁶⁶) YAs of a particular syndicate. Self-regulatory endowment of a syndicate number is the only way in which a managing agency is self-regulatorily permitted to bud YAs. Since a particular SYA's stamp's mere accounts and financial reporting cycle do not of themselves change a syndicate's legal nature or characteristics, the notion that a syndicate will transmute into something corporeal — including something corporate capable of being schemed — because of annual accounting or GAAP⁵⁶⁷ appears to be unfounded.

not an annual venture

- 2.116** A syndicate is not an 'annual venture', or a venture from 'year' to 'year', or reconstituted annually.⁵⁶⁸ All such notions, whether expressed statutorily, judicially, self-regulatorily, by veteran Market practitioners or otherwise, are erroneous and indicate fundamental and comprehensive misunderstanding⁵⁶⁹ and or failure to use ele-

⁵⁶⁴ See FSA Glossary, definition of "syndicate year": 'a year of account of a "syndicate".'

⁵⁶⁵ But see for example *General Insurance Company of Trieste, Ltd. (Assicurazioni Generali) v Cory* [1897] 1 Q.B.335, 341 (Mathew J; apparent example of incorrect use of 'syndicate'):-

It is said ... that he was not justified in doing so, and that there were several courses open to him. First, that he could have gone to the underwriters and have asked their consent to his taking out further policies; but this suggestion is not reasonable, for it is known perfectly well from the practice of underwriters that they would have told him to take the course he thought right, which would have left him just where he was. Then it is said that he might have taken out an additional policy at Lloyd's to cover the anticipated deficiency under the original policy; I am not aware that he could in fact have done so, but it is certain that he could not readily have done it, for he had no precise information to give to the proposed underwriters as to the probable result of the winding-up of the syndicate; that would therefore not have been a reasonable course for him to take.

⁵⁶⁶ It is highly singular that no fashion exists at Lloyd's, or ever has existed, to identify YAs by syndicate number and UY, as, for example, 238-2004. The London market's pandemic failure to adopt this system — and the use of 'syndicate x for the [calendar year / underwriting year / other unspecified type of 'year'] — fosters Market-wide error as to the nature of a syndicate and a SYA.

⁵⁶⁷ See for example Mkt. Bn. Y3218 (December 18, 2003; 'Lloyd's move to annual accounting'); Mkt. Bn. Y3187 (November 19, 2003; 'Lloyd's move to annual accounting'); Mkt. Bn. Y3078 (June 19, 2003; '2003 interim annual accounting return'); Mkt. Bn. Y2807 (May 31, 2002; 'Annual accounting — interim reporting'); Mkt. Bn. Y2649 (November 15, 2001; 'Annual accounting — results of review'), etc.

⁵⁶⁸ SUA 1 / SCA 1, §1.2(a) is misleading on this point.

⁵⁶⁹ A full discussion is at *Astor's Law of Lloyd's*, 2nd Ed.

mentary terminology correctly. For example: (1) a syndicate is not a venture in the first place; (2) the Corporation's authorisation to a managing agency to bud a YA of a particular syndicate every UY should usually be presumed to be of indefinite duration;⁵⁷⁰ (3) a SYA is of indefinite duration until the collectivised accounts of its participants close.

no members or participants

- 2.117** A syndicate has neither members⁵⁷¹ nor participants. It is singular how stubborn is the myth to the contrary among insurance practitioners. SUA 1,⁵⁷² §1.1's ambiguous⁵⁷³ definition of 'syndicate' — 'a group of underwriting members of Lloyd's underwriting insurance business at Lloyd's through the agency of a managing agent to which a particular syndicate number is assigned by the Council' — is profoundly infelicitous. Self-regulators-at-Lloyd's do not⁵⁷⁴ allocate any syndicate number to any group of Members (or for the purpose of designating any managing agency). Rather, self-regulators-at-Lloyd's allocate a syndicate number to a *syndicate*, viz., a mere entrepreneurial and regulatory notion. A syndicate *per se* is incapable of being a repository of PIL or of being any kind of collectivisation device. Equipped with a syndicate number as a marketing device, the managing agency then recruits participants — or their PILs — to such YAs of that syndicate as that managing agency then engineers. It is a syndicate's YAs that are the repositories for PIL and the collectivisation vehicles for the deployers of that PIL, never the syndicate. A syndicate's own self-regulatorily allocated number persists between all⁵⁷⁵ of its YAs and is incapable by itself of identifying any SYA stamp.

OTHER MARKET PARTICIPANTS

- 2.118** Consideration of insolvency involving the members' agency, managing agency, Lloyd's broker, coverholder, run-off company and assured-at-Lloyd's (the latter especially where the insurance contract expressly deals with his insolvency) has been excised from this Edition for lack of space. It is intended to include appropriate discussion in the next Edition.

⁵⁷⁰ The Corporation is understood to order a managing agency to cease budding a YA of a particular only rarely, including (for example) where a managing agency espouses the Pepper Proposition.

⁵⁷¹ Regulated Activities Order, §86(2) ('A person's membership (or prospective membership) of a Lloyd's syndicate') is utterly misconceived whether 'syndicate' is defined correctly or as a SYA.

⁵⁷² See similarly SCA 1, §1.1 definition of 'syndicate', contains the otiose 'underwriting'.

⁵⁷³ Does the definition's "which" refer to the group or the managing agency?

⁵⁷⁴ "Syndicate" 9001 seems to be a rare exception but is in reality SYA 9001-1986.

⁵⁷⁵ Unless that allocation ceases to be appropriate — for example, because the managing agency "sells", "merges" or terminates the syndicate.

Sub-chapter 2: insolvency processes

ADMINISTRATION

corporate Member or corporate SYA participant principle

- 2.119** A corporate SYA participant appears in principle to be as susceptible as any other relevant⁵⁷⁶ company to administration.⁵⁷⁷ Insolvency Act 1986, Sch. B1 applies without⁵⁷⁸ the modifications⁵⁷⁹ promulgated in relation to an 'insurer' as defined. For the assured-at-Lloyd's in BBSN circumstances, a corporate SYA participant in administration is a mere BO matter irrelevant to the FO and MO availability of claims payment securitisation funds.

self-regulation

- 2.120** Lloyd's Act 1982, s.9 provides for automatic termination of Membership if a Member be 'adjudicated or declared insolvent' by due process within an EEC member state, which includes the UK. If made by a court satisfied that the company is (*cf.* is likely to become⁵⁸⁰) unable to pay its debts,⁵⁸¹ an administration order is arguably such an adjudication.

may be appropriate

- 2.121** Administration may be appropriate to foil a winding-up petition⁵⁸² or an impending winding-up resolution;⁵⁸³ to take advantage of other moratoria⁵⁸⁴ (though limitation periods should be watched carefully⁵⁸⁵); to effect the removal of an administrative

⁵⁷⁶ *Viz.* a 'company' within Companies Act 1985, s.735: Insolvency Act 1986, s.251, last paragraph. The list of entities in Enterprise Act 2002, s.249 ('Special administration regimes') is not presently relevant.

⁵⁷⁷ See generally Insolvency Act 1986, Part II; *ibid.*, Sch. B1.

⁵⁷⁸ See FSMA 2000, s.360 (Insurers) read with Financial Services and Markets Act 2000 (Administration Orders relating to Insurers) Order 2002 SI 2002/1242, §3 read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634; made under FSMA 2000, s.355(2)), §2 read with Regulated Activities Order, §13.

⁵⁷⁹ *Cf.* the version of Insolvency Act 1986, Sch. B1 as modified by Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242).

⁵⁸⁰ Insolvency Act 1986, Sch. B1, §11.

⁵⁸¹ See for example Insolvency Act 1986, Sch. B1, §11:-

The court may make an administration order in relation to a company only if satisfied — (a) that the company is or is likely to become unable to pay its debts, and (b) that the administration order is reasonably likely to achieve the purpose of administration.

And see procedurally (for example) *ibid.*, §6 (administrator must be an insolvency practitioner).

⁵⁸² See Insolvency Act 1986, Sch. B1, §40(1)(a) (dismissal of a winding-up petition); *ibid.*, §42(3) (no winding-up order may be made). And see *ibid.*, §40(1)(b) (suspension of petition pending administration). *Ibid.*, §§40(2)(b) and 42(4)(b) do not apply because the FSA has no power to petition under FSMA 2000, s.367 to wind up a corporate SYA participant because the latter does not come within *ibid.*, s.367(1)(a)-(c). See also *ibid.*, §83 ('Moving from administration to creditors' voluntary liquidation').

⁵⁸³ See Insolvency Act 1986, Sch. B1, §42(2).

⁵⁸⁴ See generally Insolvency Act 1986, Sch. B1, §§42-44.

⁵⁸⁵ See recently for example *Re Cosslett (Contractors) Ltd.* [2004] All ER (D) 241 (Mar) (Patten J).

or other receiver;⁵⁸⁶ and for the purpose of realising⁵⁸⁷ the company's relevant property (presumably mostly already captive as FAL) to distribute⁵⁸⁸ to BO secured⁵⁸⁹ and preferential⁵⁹⁰ creditors, which is not a state ever enjoyed by any assured-at-Lloyd's — *cf.* BO creditors holding security interests, as under FAL, in relation to whom the moratorium⁵⁹¹ provisions may be useful. Perhaps administration (and the administrator's general managerial and reconfiguration powers⁵⁹²) would be appropriate for a substantial corporate SYA participant as a prelude to a s.425 scheme⁵⁹³ (less so a CVA;⁵⁹⁴ also to creditors' voluntary liquidation,⁵⁹⁵ and dissolution⁵⁹⁶) in relation to (in BBSN circumstances) its BO creditors and (in not-BBSN circumstances) to its BO and FO creditors (the latter pursuing the administratee's free assets for any Lloyd's enterprise PU and CU fund deficit). The administrator will need to do the usual exhaustive due diligence on relevant BO and FO legal instruments and sources of liability, and actionable misconduct sustained by the company in the peculiar context of the agency and other BO relationships to which the corporate SYA participant is necessarily subject.⁵⁹⁷

may not be appropriate

- 2.122** Administration may not be appropriate to all the trading circumstances of a corporate SYA participant, who is not susceptible as a conventional trading company to rescue as a going concern,⁵⁹⁸ whose assets are not capable of being much aggran-

⁵⁸⁶ See Insolvency Act 1986, Sch. B1, §41(1) (administrative receiver vacates office on administration order taking effect); *ibid.*, §41(2) (other type of receiver must vacate on administrator requiring him to do so).

⁵⁸⁷ See Insolvency Act 1986, Sch. B1, §3(1)(c) etc. (administrator must usually perform his functions with a view to realising property to distribute it to secured or preferential creditors).

⁵⁸⁸ See Insolvency Act 1986, Sch. B1, §65(1) (administrator's power to distribute to secured or preferential creditor; the court's leave is required for a distribution to another type of creditor: *ibid.*, §65(3)).

⁵⁸⁹ Insolvency Act 1986, s.248 defines 'secured creditor' as used in *ibid.*, Parts I-VI (which includes Insolvency Act 1986, s.8), except insofar as the context otherwise requires:-

(a) "secured creditor", in relation to a company, means a creditor of the company who holds in respect of his debt a security over property of the company, and "unsecured creditor" is to be read accordingly; and
(b) "security" means — (i) in relation to England and Wales, any mortgage, charge, lien or other security, and (ii) in relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set off).

See generally (for example) Insolvency Act 1986, Sch. B1, §3(1)(c) (but see *ibid.*, §3(2)); 65(1); 73(1)(a). The administrator, when in place, must specify the security held by each creditor (*ibid.*, §47(2)(e)) and the date on which each security was granted (*ibid.*, §47(2)(f)).

⁵⁹⁰ See generally (for example) Insolvency Act 1986, Sch. B1, §3(1)(c) (but see *ibid.*, §3(2)); 65(1); 73(1)(b)-(c).

⁵⁹¹ See Insolvency Act 1986, Sch. B1, §43(2) (moratorium on enforcing security without the administrator's consent or the court's permission); *ibid.*, §43(6) (moratorium on all legal process without *ditto*); *ibid.*, §43(6A) (moratorium on appointment of administrative receiver).

⁵⁹² See the list at Insolvency Act 1986, Sch. 1. And see recently *The Designer Room Ltd.* [2004] All ER (D) 411 (Mar) (Rimer J).

⁵⁹³ See Insolvency Act 1986, Sch. B1, §49(3)(b).

⁵⁹⁴ See Insolvency Act 1986, Sch. B1, §49(3)(a).

⁵⁹⁵ Insolvency Act 1986, Sch. B1, §83 ('Moving from administration to creditors' voluntary liquidation').

⁵⁹⁶ See Insolvency Act 1986, Sch. B1, §84 ('Moving from administration to dissolution'). Dissolution would, in the FO, prevent the assured-at-Lloyd's using the corporate SYA participant as a conduit to certain expressly available claims payment securitisation trust funds.

⁵⁹⁷ See ¶2.105 *et seq.*

⁵⁹⁸ See Insolvency Act 1986, Sch. B1, §3(1)(a) etc. (administrator must usually perform his functions with a view to rescuing the company as a going concern).

dised by enlightened managerial intervention,⁵⁹⁹ and whose executive directors⁶⁰⁰ are in any event inherently defunct⁶⁰¹ (and where the administrator⁶⁰² would similarly be in his place) in relation to the SYA participant's own business, which must be conducted under SCA 1 by the managing agency of each SYA on which it participates. Nor would a corporate Member, in the nature of its business, need the moratoria⁶⁰³ available *via* administration as a conventional trading company might, to protect it from any FO creditors, who are already fully securitised by the Lloyd's enterprise and to whom the corporate Member is irrelevant in BBSN circumstances. Nor would an assured-at-Lloyd's be necessarily attracted, even in not-BBSN circumstances, to commuting with the company's administrator in relation to the SYA participant's solitary line — leaving him yet to recover in relation to every other line — if he can commute the entire insurance transaction through a Lloyd's broker and managing agencies in the ordinary way (the assured's-at-Lloyd's decision will presumably depend on the size of administratee's line on the insurance contract).

FSA intervention

- 2.123** The FSA has no power to apply for an administration order in relation to a corporate SYA participant under FSMA 2000, s.359⁶⁰⁴ (petition for administration order).

practice

- 2.124** The administrator is required, as soon after his appointment as practical, to obtain a list of the company's creditors.⁶⁰⁵ and prepare the company's statutory statement of affairs.⁶⁰⁶ He is required to particularise the company's debts and liabilities,⁶⁰⁷ and give the names and addresses of its creditors.⁶⁰⁸ He will use the usual due diligence to ascertain all the company's BO creditors and prepare an exhaustive checklist of particular BO instruments giving rise to particular BO liabilities, and the measures necessary or expedient to obtain their financial and formal discharge, especially by using FAL. The list will include (for example): (1) MA 1, which brought Membership into being in the first place and effected the Council's self-regulatory jurisdiction, giving rise to particular Member-level and SYA-level funding obligations, including to fund the Central Fund by contribution and reimbursement, and to pay Corporation fees and expenses; (2) all FAL instruments; (3) all PTDs-premium, giving rise to a variety of BO funding obligations; (4) all SCA 1s, giving rise to particular SYA-level obligations such as to pay devices such as cash calls, and to pay particular items such as insurance contracts, and managing agency fees and expenses. The administrator will obtain from each of the corporate SYA participant's managing agencies an exhaustive list of insurance contracts to which it is an origi-

⁵⁹⁹ See Insolvency Act 1986, Sch. B1, §3(1)(b) etc. (administrator must usually perform his functions with a view to getting a good result for creditors better than winding up the company straight away).

⁶⁰⁰ See Insolvency Act 1986, Sch. B1, §61(a) (administrator's power to remove a director); *ibid.*, §61(b)(power to appoint a director).

⁶⁰¹ See SUA 1 / SCA 1, §7.3. And see *Henderson v Merrett Syndicates Ltd.* {1a} [1994] 193, 197 (Saville J; not affected on appeal). The SYA-level passivity rule is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

⁶⁰² See Insolvency Act 1986, Sch. 1, §14 (power to carry on the business of the company).

⁶⁰³ See Insolvency Act 1986, Sch. B1, §42-44.

⁶⁰⁴ Because FSMA 2000, s.359(1)(a)-(c) do not apply.

⁶⁰⁵ Insolvency Act 1986, Sch. B1, §46(3)(a).

⁶⁰⁶ See Insolvency Act 1986, Sch. B1, §§47-48.

⁶⁰⁷ See Insolvency Act 1986, Sch. B1, §47(2)(c).

⁶⁰⁸ See Insolvency Act 1986, Sch. B1, §47(2)(d).

nal or novated party (conventional RTC arguably has a novatory BO effect⁶⁰⁹); (5) every other BO instrument capable of giving rise to a funding obligation either way, such as conventional outward-RTC. In thus proceeding, the administrator requires a genuine and fluent command of all relevant FO, MO, BO, Member-level and SYA-level affairs at Lloyd's.

contacting assureds-at-Lloyd's; preserving the conduit effect

- 2.125** Administration does not involve any creditor voting on the process (*cf.* CVA, s.425 scheme), which saves deliberating on whether assureds-at-Lloyd's need be contacted by a Wilson notice. There is no presumably no need in BBSN circumstances for the administrator to otherwise contact any assured-at-Lloyd's in the FO, to whom a SYA participant's personal financial circumstances are irrelevant and whose recourse is in no way prejudiced either by those circumstances or his failure to timeously discover them or involve himself in them. But he should presumably do nothing, such as procure the company's heirless dissolution, to disrupt the SYA participant as the assured's-at-Lloyd's insurance contract conduit to relevant MO and BO claims payment securitisation funds, even when relevant BO obligations appear to have been discharged.⁶¹⁰

the Corporation

- 2.126** Being not a company, Insolvency Act 1986, Part II appears to not apply to the Corporation. Nor is the Corporation presently included among the other entities⁶¹¹ to which the Treasury is empowered⁶¹² to extend Insolvency Act 1986, Part II.

Lloyd's broker

- 2.127** Administration has been used to run off the business of an insolvent Lloyd's broker. The administrator works with the Lloyd's broker's clients to establish an rational and controlled process for the Lloyd's broker, under the administrator's control, to broke and process outstanding claims (presumably, in the case of every claim, for no further remuneration than the original commission). This subject will be dealt with in the Second Edition.

BANKRUPTCY OF A NATURAL SYA PARTICIPANT

principle

- 2.128** English bankruptcy⁶¹³ is as available in principle to a natural SYA participant as to any other eligible insolvent.

self-regulation

automatic termination of Membership

- 2.129** This is discussed elsewhere.⁶¹⁴

⁶⁰⁹ Discussed in detail at *Astor's Law of Lloyd's*, 2nd Ed., and summarised at Appendix I.

⁶¹⁰ *Cf.* for example similar dynamics in relation to EquitasRe-reinsured insurance contracts, where the natural Accepting Name has been released (see RRC 1) from all relevant BO obligations, and remains on the insurance contract as the EquitasRe-assured's-at-Lloyd's conduit to relevant MO trust funds.

⁶¹¹ See Enterprise Act 2002, s.255(1).

⁶¹² By Enterprise Act 2002, s.255(2)(b).

⁶¹³ See generally Insolvency Act 1986, Part IX; *ibid.*, Schs. 4A and 5.

⁶¹⁴ See ¶2.50.

effect on FO and other BO instruments

- 2.130** Bankruptcy has no such SYA-level effect. All FO insurance contracts remain; all BO agency contracts, trust deeds, FAL instruments, RRCs, and other like instruments (such as conventional RTC contracts) appear to remain in full force and effect, and need to be discharged individually. The bankrupt SYA participant's trustee in bankruptcy is included in SMA 1, §1.1's, SMA 2, §1.1's and SUA 1, §1.1's definition of 'Name'.⁶¹⁵ And see similarly SIA 1, §1.1's definition of 'Names'. PTD (general) 2002.

SYA participant's BO notification obligations

- 2.131** SMA 2 requires⁶¹⁶ the (natural or corporate) Member to 'forthwith' notify his SMA 2 members' agency of the following events (as appropriate): a bankruptcy petition is presented against him;⁶¹⁷ he makes or proposes any composition with his creditors or otherwise acknowledges his insolvency;⁶¹⁸ he makes an application to the court for an Insolvency Act 1986, s.253 interim order (IVA);⁶¹⁹ a bankruptcy order is made against him by the due process of law of any country;⁶²⁰ he is adjudicated bankrupt, or adjudicated or declared insolvent, by the due process of law of any country;⁶²¹ a proposal is made in respect of it under Insolvency Act 1986, s.2 (CVA);⁶²² an order is made, a resolution is passed or an act, decree or other instrument is passed for its winding up or dissolution;⁶²³ a receiver, trustee or analogous officer is appointed in respect of the whole or any material part of his property or assets;⁶²⁴ it or its directors present or file in any court a petition in respect of its bankruptcy, winding up or other insolvency or which seeks any reorganisation, dissolution or similar relief;⁶²⁵ any action equivalent to any of the above is taken by or in respect of him.⁶²⁶

statutory demand**generally**

- 2.132** The Council has taken active steps to remove the risks of bankruptcy from certain SYA participants.⁶²⁷ Having, in an apparent departure from tradition,⁶²⁸ a robust⁶²⁹

⁶¹⁵ SUA 1, §1.1 (so far as presently relevant): "'Name" includes (i) the Name's executors or administrators, trustees in bankruptcy and any receiver appointed under the Mental Health Act 1983 and any person performing similar functions in any jurisdiction'

⁶¹⁶ See SMA 2, §9.4.

⁶¹⁷ See SMA 2, §9.4(a)(i).

⁶¹⁸ SMA §9.4(a)(ii).

⁶¹⁹ SMA §9.4(a)(iii).

⁶²⁰ SMA §9.4(a)(iv).

⁶²¹ SMA §9.4(a)(v).

⁶²² SMA §9.4(a)(vi).

⁶²³ SMA §9.4(a)(vii).

⁶²⁴ SMA §9.4(a)(ix).

⁶²⁵ SMA §9.4(a)(x).

⁶²⁶ SMA §9.4(a)(xi).

⁶²⁷ As in the 1998-9 PCW novation controversy. The effect of the novation, wholly neutral as regards PCW Assenting Names, was to remove the three participants on SYA 9001 from the chain of personal liability. See for example the September 8, 1998 letter from the then Chairman of Lloyd's to PCW Names, p.3 ('Lloyd's ... considers that syndicate 9001 should now be removed from the reinsurance chain because their continuing personal involvement is no longer necessary or appropriate and it is desirable to simplify needlessly complex arrangements'). The mechanism of novation into Lioncover may be a serviceable precedent for novation of SYA participants' relevant contracts more generally.

approach to debt collection (and letters before action⁶³⁰), the Corporation — usually using (curiously unchallengedly) the bogus name "Society of Lloyd's"⁶³¹ — has issued statutory demands⁶³² and presented bankruptcy petitions⁶³³ against those Eq-

628 See (for example) General Meeting of Members of Lloyd's, Wednesday 26th June, 1985, Statement by Mr. Peter Miller, Chairman, p.3:-

The question as to what we do ... with regard to the recovery of those monies from the individual Name will be one for the Council. We shall use all legal remedies to ensure proper discharge of responsibilities. However, I repeat what I have said before, that it would be no part of the Council's policy to drive any personal finally into bankruptcy who makes a genuine attempt to meet his full obligations.

And see *Hansard*, January 12, 1994, col.286; Paul Marland MP (Conservative):-

The Lloyd's hierarchy put it about that they do not make people bankrupt. In the recent past, Lloyd's has made 169 people bankrupt - except those whom it has forced into independent voluntary arrangements - and has levelled similar threats at a further 3,500. What is so misleading about the statement, "We do not make people bankrupt", is the fact that the banks do it for Lloyd's, through the bank guarantee offered to Lloyd's as security by those who struggle to qualify. Lloyd's then calls in the guarantee; the bank then asks the Lloyd's investor how he will service the borrowings, and if he cannot do so the bank makes him bankrupt.

629 See for example Corporation RA fye December 31, 1999, p.36 ("we remain determined to secure the maximum amount available from those who have the ability to pay").

630 See *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156, 158 (Hobhouse LJ):-

The Society started to send out letters before action to non-accepting Names in October 1996 and in the same month started to issue writs against them individually. This process continued until the following summer and some individual Names did not have writs served upon them until after July 1997. Thus it was that although by the latter part of 1996 there were well established proceedings against a large number of non-accepting Names which claimed sums said to be due under the reinsurance contract [RRC 4], not all the individuals with whom we are now concerned and against whom Order 14 judgments have now been entered were parties to any litigation at that stage although they no doubt appreciated that, failing their reaching some acceptable agreement with the Society, they too would be sued.

631 See ¶2.16.

632 See for example *Lloyd's v Bowman* [2003] EWCA Civ 1886, [2003] All ER (D) 393 (Dec) (CA); *Everard v Lloyd's* [2003] EWHC 1890 (Laddie J); *Re: A debtor Number 544/SD/98* [2001] BCLC 103 (Jacob J); *Jones v Lloyd's*; *Standen v Lloyd's*, *The Times* 2 February 2000 (Rattee J); *Re a debtor* (No 544/SD/98) [2000] 1 BCLC 103 (CA); *Lloyd's v Cook* (16 September 1999; unreported; Colman J); *Garrow v Lloyd's*, *The Times*, 18 June 1999; unreported; Jacob J); *McAllister v Lloyd's* [1999] Lloyd's Rep. IR 487 (Carnwath J), etc. And see *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482 (Jacob J), in which the judge discretionarily set aside the Corporation's statutory demand because he felt the debtor had a strong cross-claim; the Corporation's appeal was dismissed at [2000] Lloyd's Rep. IR 38, 43 *et seq.* (Robert Walker LJ). Similarly in *McAllister v Lloyd's* [1999] Lloyd's Rep. IR 487, 494 (Carnwath J), the judge set aside the Corporation's statutory demand because the Member proved that there was an arguable case under Insolvency Rules 1986, Rule 6.5(4)(b) ("the debt is disputed on grounds which appear to the court to be substantial ..."). For the Corporation's apparent legal confusion in relation to stays of execution, see the summary at *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482, 483-4 (Jacob J):-

The Court of Appeal in *Leighs* indicated that it might be possible for individuals who would suffer hardship to apply for stays of execution. I was told that some 15 individuals have done this before the Master. Two cases reached Colman J on November 6 1998. Somewhat bizarrely the procedural position as regards bankruptcy was wholly misunderstood at that time. Lloyd's contended that a stay of execution would have the automatic effect of preventing bankruptcy proceedings which was simply not so. Moreover, the precise effects of bankruptcy, and in particular what would happen to the bankrupt's cause of action for fraud was not really in point.

And see for example *Re a debtor* (No 140 IO of 1995) [1996] 2 BCLC 429.

633 For the Corporation's approach to bankruptcy petitions, see for example *Re Mickethwaite* [2002] EWHC 1123 (Peter Smith J); *Lloyd's v Waters* [2001] BPIR 698 (Park J). And see *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482, 484 (Jacob J.): counsel for the Corporation:-

contended that what Lloyd's needed, and were entitled to, was to get a petition on foot. She said they needed this for two reasons.. Firstly, quite generally and in other cases, Lloyd's were worried about potential dispositions of property at an undervalue or by way of preference. There is a time limit which runs from the day of presentation of the petition (see section 341 of the Insolvency Act 1986). ... As to the general worry, there is no material in this case suggesting that any other transaction of Mr. Garrow's could be remotely affected. Moreover, in the case of all the people in Mr. Garrow's position, it has been open to Lloyd's if they had material indicating a likelihood of disposition of assets, to apply for the usual remedy, namely a freezing order. I do not think that it is appropriate to say that a petition should be presented and then suspended simply so that, even though it might ultimately be dismissed, the creditor would get protection in the meantime.

uitasRe-reinsured summary⁶³⁴ judgment debtors who have defaulted on the RRC 4 obligation to pay the Corporation EquitasRe-reinsurance premium⁶³⁵ plus interest⁶³⁶ from each severally liable⁶³⁷ refuseniks,⁶³⁸ some of whom claimed that they could not afford it⁶³⁹ (RRC 4 was compulsory whether or not the Member could afford it).⁶⁴⁰ The Corporation (which has obtained at least one bankruptcy order against a

The judge refused the Corporation's curious request to permit a bankruptcy petition to be issued and then go into suspended animation. The Court of Appeal dismissed the Corporation's appeal on the point: [2000] Lloyd's Rep. IR 38, 43-44 (Robert Walker LJ.). *Ibid.*:-

Although Lloyd's has a judgment against Mr Garrow, it has chosen to proceed by way of a statutory demand and the statutory demand is crucial to the making of a bankruptcy order. It would be contrary to the scheme of the legislation, and to the practice of the bankruptcy court, to allow a doubtful statutory demand to stand on the ground that the debtor would still have the opportunity of opposing a bankruptcy petition, once presented. Counsel for Lloyd's have argued that that course would enable Lloyd's to present a petition and so establish a date by reference to which transactions might be invalidated or impeached under sections 284 and 339 (and following) of the Insolvency Act 1986, while protecting Mr Garrow by an adjournment of the final hearing of the petition. However it is precisely because of the far-reaching effect of those sections (and comparable sections in the winding-up legislation) that the bankruptcy court and the Companies Court have a strong and well-established policy of discouraging long or repeated adjournments of bankruptcy and winding-up petitions.

⁶³⁴ For a summary of the Corporation's pleadings, see *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156, 161-2 (Hobhouse LJ). Historically, see for example *One Lime Street*, March 1998, p.1 ("Debt recovery gets go-ahead"):-

Lloyd's will enforce proceedings to collect more than £100 million in unpaid debt from members who have refused to meet their liabilities under Lloyd's reconstruction and renewal programme at a hearing on 11 March. The move follows an important ruling in the UK's High Court by Mr Justice Tuckey who decided that records held centrally by Lloyd's provide conclusive evidence of the amounts owed to the Society by members.

And see *ibid.*, November 1996, p.4 ("Debt recovery progressing well"); *ibid.*, October 1996, p.1 ("Action on Names' debts"). The Corporation was suing Members before R&R: see for example *ibid.*, May 1995, p.1:-

Firmer action to improve the collection of outstanding debts has been approved by Lloyd's Regulatory Board. The new approach works through the existing contractual obligations of underwriting agents to pursue the payment of certain cash calls made on members. It will ensure that money owed by Names to the Society is pursued by agents within the existing regulatory framework and reflects the concern that effective debt recovery measures are in place in the interests of all Names.

⁶³⁵ For the Corporation's approach to enforcement of judgments that it has obtained for payment of the EquitasRe-reinsurance premium, see (for example) *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482, 483-4 (Jacob J.):-

In some cases Lloyd's have obtained charging orders against their principal residences upon the basis that those orders will not be enforced. To the extent of the values of those properties Lloyd's have therefore secured their position. In other cases Lloyd's have proceeded by way of execution on goods. The Court of Appeal in *Leighs* indicated that it might be possible for individuals who would suffer hardship to apply for stays of execution.

And see *ibid.* on appeal [2000] Lloyd's Rep. IR 38, 40-41 (Robert Walker LJ.):-

Lloyd's has obtained summary judgment against numerous other defendants in the same position as Mr Garrow, and has served statutory demands on many of them. Since the judgment of Jacob J, Lloyd's has agreed with the solicitors for the other counterclaimants that other applications to set aside statutory demands will be held in suspense until the determination of this appeal.

⁶³⁶ On the Corporation's right to interest, see for example RRC 4, §5.3:- [q]

⁶³⁷ RRC 4, §5.7:-

The obligation of each Name to pay his Name's Premium shall be several and not joint and no Name shall have any liability to [Equitas Re] in respect of any Name's Premium of any other Name or any other consideration to be provided to [Equitas Re] for which any other Name is liable.

⁶³⁸ See *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156, 158 (Hobhouse LJ; "The various defendants were underwriting Names who had not accepted the settlement offered to them in August 1996").

⁶³⁹ See for example *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156, 158 (Hobhouse LJ):-

The sums of money involved are in the aggregate very substantial and of very considerable concern to many of the individual Names who say that they will be unable to satisfy the judgments which have been entered against them. The extent to which this is correct has not been investigated but it must be assumed that in respect of at least some of the Names this is the position. Similarly it must be accepted that it is of importance to the Society that it should recover the sums which it says are owing to it.

refusenik.⁶⁴¹ As to a Member selling insurance at Lloyd's in the first place, there appear to have been no Insolvency Act 1986, s.362⁶⁴² prosecutions yet.

- 2.133** The Court of Appeal has held that RRC 4's own PNSL clause⁶⁴³ does not prevent a defaulting EquitasRe-reinsured SYA participant raising appropriate defences against the Corporation,⁶⁴⁴ but that that PNSL clause does require the Equitas-RTced SYA participant, including if a refusenik, to pay the compulsory EquitasRe-reinsurance premium⁶⁴⁵ to the Corporation as Equitas Re's legal assignee.⁶⁴⁶ RRC

⁶⁴⁰ See for example (among numerous others) *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156 (CA); *Lloyd's v Jaffray* {1} [1999] Lloyd's Rep. IR 182 (Colman J); *McAllister v Lloyd's* [1999] Lloyd's Rep. IR 487 (Carnwath J; bankruptcy proceedings subsequently brought by the Corporation against certain judgment debtors). And see the summary at *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482, 483-4 (Jacob J, not affected on appeal at [2000] Lloyd's Rep. IR 38):-

In the *Leighs* case, the Court of Appeal held that [RRC 4] clause 5.5 prevented the defendants from raising matters by way of set-off or counterclaim. But it did not prevent them from raising those matters by way of a separate action. The matters the defendants (and others, who were not defendants) wished to raise are a claim against Lloyd's in fraud. So those in the same position as Mr. Garrow along with those who are not cross-claimants have brought claims in the commercial court for fraud. There are, I understand, some 200 claimants in all. Some of these who are liable to pay premiums pursuant to [RRC 4] clause 5.5 have meanwhile paid these. But those who are in financial difficulties have not. In some cases Lloyd's have obtained charging orders against their principal residences upon the basis that those orders will not be enforced. To the extent of the values of those properties Lloyd's have therefore secured their position. In other cases Lloyd's have proceeded by way of execution on goods. The Court of Appeal in *Leighs* indicated that it might be possible for individuals who would suffer hardship to apply for stays of execution. I was told that some 15 individuals have done this before the Master. Two cases reached Colman J on November 6 1998. Somewhat bizarrely the procedural position as regards bankruptcy was wholly misunderstood at that time. Lloyd's contended that a stay of execution would have the automatic effect of preventing bankruptcy proceedings which was simply not so. Moreover, the precise effects of bankruptcy, and in particular what would happen to the bankrupt's cause of action for fraud was not really in point.

⁶⁴¹ See for example *One Lime Street*, June 1997, p.4 ("Bankruptcy for debtor"):-

Lloyd's has obtained its first bankruptcy order against a member of the Society. ... The Assistance and Recovery Committee (ARC) twice considered the case and decided on both occasions to decline [the Member's] ... lower offer and press for payment in full. In the absence of full payment, Lloyd's petitioned Macclesfield County Court and on 6 June [the Member] ... was adjudged bankrupt. The ARC regards bankruptcy as very much the last resort in its debt collection strategy but one that it will not shirk from.

⁶⁴² Insolvency Act 1986, s.362 provides that a bankrupt commits an offence if the bankrupt has:-

materially contributed to, or increased the extent of, his insolvency by gambling or by rash and hazardous speculations, or ... lost any part of his property by gambling or by rash and hazardous speculations.

⁶⁴³ RRC 4, §5.5.

⁶⁴⁴ RRC 4, §5.5(b)'s phrase "in connection with" is to be given the same construction as SMA 1, §9(c)'s phrase "connected with": *Garrow v Lloyd's* [2000] Lloyd's Rep. IR 38, 46 (Robert Walker LJ), applying *Arbuthnott v Fagan* [1996] LRLR 135 (CA). And see the judge's comparison of the two PNSL clauses at *op. cit.*, 45 (the two clauses were not compared in the earlier case on RRC 4, §5.5, *Lloyd's v Leighs* [1997] CLC 1398 (CA)). SMA 1, §9(c):-

It shall be a condition precedent to the issue of proceedings or the making of any reference to arbitration by the name in respect of any matter arising out of or in any way connected with either the making of such requirement by the agent or the subject matter thereof, or the preparation or audit of the account referred to in clause 6, that the name shall have duly complied with any such requirement made or purported to be made by the agent and no cause of action in respect of any such matter shall arise or accrue in favour of the name until such requirement shall have in all respects been duly complied with. At no time shall the name seek injunctive or any other relief for the purpose (or which has the result) of preventing the agent from making or enforcing any such requirement

And see at first instance *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482, 483 *et seq.* (Jacob J).

⁶⁴⁵ See *Astor's Equitas Re Handbook*.

⁶⁴⁶ *Lloyd's v Leighs* {1a} [1997] CLC 759 (Colman J); *ibid.*, {2a} [1997] CLC 1012 (Colman J); *ibid.*, {1b & 2b} [1997] CLC 1398 (CA); *Lloyd's v Fraser* [1999] Lloyd's Rep. IR 156 (CA). For a summary of allegations in the latter, see *op. cit.*, 162 (Hobhouse LJ): the defendants:-

attacked the effect of the reinsurance contract itself [RRC 4] basically on arguments of construction and public policy (again referring to their fraud allegations). The primary point of attack was upon clause 5.5 and the provision which required that the reinsurance premium be paid without set off. It was argued that because allegations of fraud were being made against the Society [*viz.*, the Corporation] it would not be right to construe the no set-off clause as applying to such matters or it would be contrary to public policy

4's PNSL clause is particularly irrelevant to the defaulting EquitasRe-reinsured SYA participant's right to contest a Corporation's statutory demand on the ground of substantial counterclaim.⁶⁴⁷ Indeed, summary judgment may be no obstacle to a defence and counterclaim.⁶⁴⁸ As at the end of July 1998, few if any defences remained to Members against the Corporation's summary judgment applications to enforce the PNSL clause, including fraud.⁶⁴⁹

application to set aside

2.134 Applications to set aside have been granted⁶⁵⁰ and dismissed.

FSA intervention

2.135 The FSA, as a 'qualified creditor',⁶⁵¹ is empowered⁶⁵² to present a bankruptcy petition, against an 'individual'⁶⁵³ on certain grounds⁶⁵⁴ either of which constitutes apparent insolvency.⁶⁵⁵ In relation to an 'individual',⁶⁵⁶ the FSA is entitled to be 'heard' on a hearing of an Insolvency Act 1986, s.264 petition⁶⁵⁷ or any other relevant hearing.⁶⁵⁸ No⁶⁵⁹ natural SYA participant is within the FSA's remit. Were a Member or SYA participant to be brought within the FSA's bankruptcy jurisdiction, he will bear in mind that a FSMA 2000, s.372(4)(a) demand is to be treated as if it were an Insolvency Act 1986, s.268 statutory demand.⁶⁶⁰

because it would be tantamount to allowing someone to escape from liability for their fraud or would have that effect and therefore should not be regarded as enforceable.

And see the summary at *Garrow v Lloyd's* [2000] Lloyd's Rep. IR 38, 45-46 (Robert Walker LJ).

⁶⁴⁷ *Garrow v Lloyd's* [2000] Lloyd's Rep. IR 38, 46 (Robert Walker LJ), on appeal from [1999] Lloyd's Rep. IR 482 (Jacob J). *Ibid.*, 46:-

Mr. Garrow has made plain through his counsel that he does not ... challenge his liability for the [RRC 4 EquitasRe-reinsurance] ... premium. He asserts that he has a genuine and serious counterclaim of sufficient size to enable him to ask the bankruptcy court to exercise its discretion to set aside the statutory demand served by Lloyd's. The real issue is whether the "procedural insulation" achieved by [RRC 4] clause 5.5, fairly construed in accordance with the principles stated in *Arbuthnott v Fagan* [1996] LRLR 135 (CA) and *Leighs* [1997 CLC 1398 (CA)] prevents him from doing so. I do not consider that clause 5.5 has that effect, for reasons essentially the same as those given by this court in *Arbuthnott*. ... Leading counsel for Lloyd's also relief on clause 5.5(c), pointing out that it refers to the enforcement of an obligation (rather than a judgment). But Lloyd's is a judgment creditor and Mr Garrow's original contractual obligation has been transformed into a judgment debt. In the circumstances of this case clause 5.5(c) adds nothing to clause 5.5(a).

⁶⁴⁸ See the summary at *Garrow v Lloyd's* [2000] Lloyd's Rep. IR 38, 42 (Robert Walker LJ):-

[T]he fact that Mr Garrow put in a defence, despite having had summary judgment entered against him, is an oddity resulting from the terms of Colman J's directions....

⁶⁴⁹ See the summary at *Lloyd's v Jaffray* [1999] Lloyd's Rep. IR 182, 184 (Colman J).

⁶⁵⁰ *Garrow v Lloyd's* [1999] Lloyd's Rep. IR 482 (Jacob J), appeal dismissed at [2000] Lloyd's Rep. IR 38 (CA), in which the Corporation's statutory demand, based on the EquitasRe-reinsured SYA participant debtor's default under RRC 4, §5.5, was set aside.

⁶⁵¹ FSMA 2000, s.372(6)(a).

⁶⁵² FSMA 2000, s.372(1)(a). For grounds, see *ibid.*, s.372(2).

⁶⁵³ FSMA 2000, s.372(1). 'Individual' is defined at *ibid.*, s.372(7). Cf. for example (in the context of an application under Insolvency Act 1986, s.253), FSMA 2000, s.357(1).

⁶⁵⁴ Set out at FSMA 2000, s.372(2)(a)-(b).

⁶⁵⁵ FSMA 2000, s.372(6)(b).

⁶⁵⁶ Defined at FSMA, s.374(5), substantially identically to *ibid.*, s.372(7).

⁶⁵⁷ See FSMA 2000, s.374(2)(a) read with *ibid.*, s.374(1)(a).

⁶⁵⁸ Set out at FSMA 2000, s.374(2)(b).

⁶⁵⁹ Because he is outside the FSMA, ss.372(7) and 374(5) definition: he is not *ibid.*, s.19(1)(a) authorised, and he is not contravening the *ibid.*, s.19(2) 'general prohibition' because he is an *ibid.*, s.19(1)(b) 'exempt person': see Regulated Activities Order, §13.

⁶⁶⁰ FSMA 2000, s.372(5).

Wilson notice to assureds-at-Lloyd's

- 2.136** Public advertisement of a SYA participant's bankruptcy is not unknown⁶⁶¹ (it would not be surprising if more than a few US assured-side lawyers, of whatever specialty, knew the proper response). Such a notice is utterly pointless in BBSN circumstances — for which reason it is very rare — both FO (the assured-at-Lloyd's retains recourse against relevant claims payment securitisation funds) and BO (BO creditors remain). It is unnecessary for the purpose of avoiding double liability for the same debt since the assured-at-Lloyd's would never find it necessary or appropriate to prove in the first place. Nor is it necessary or appropriate for a SYA participant's insolvency guardian to advertise that the debtor is no longer as a BO matter considered to be a functional participant on a particular SYA.

CVA**of a SYA participant principle**

- 2.137** A corporate SYA participant not⁶⁶² in administration or liquidation⁶⁶³ appears to be able to enter into a CVA as any other relevant⁶⁶⁴ company. A moratorium is in principle available where the company's directors intend to make a proposal.⁶⁶⁵ The process is an 'insolvency event'⁶⁶⁶ for BO self-regulatory purposes.

appropriateness

- 2.138** Whether a CVA be appropriate to an eligible corporate SYA participant depends on the same sort of considerations already note in the context of Insolvency Act 1986, s.8 administration. The usual confusion is likely to supervene concerning FO and BO liabilities, in BBSN and not-BBSN circumstances. In BBSN circumstances, there is, as with any other insolvency process involving the *solus*, no reason why a subscribing SYA participant's personal finances should be of interest to any assured-at-Lloyd's, including in the context of commutation. The assured-at-Lloyd's need never know of the CVA, is not prejudiced as to his recourse if he fails to par-

⁶⁶¹ For example, in *Business Insurance*, the following 'legal notice' appeared, in BBSN circumstances:-

NOTICE OF BANKRUPTCY OF LLOYD'S NAMES On January 30, 2003, Aubrey Linn Wilson, Sr., and Joan Burch Wilson, former Names at Lloyd's, filed a Chapter 7 bankruptcy, case # 03-50512-C, in the Bankruptcy Court for the Western District of Texas, San Antonio Division. Policyholders and other beneficiaries of policies insured or reinsured by those syndicates listed below who may have claims against Mr. or Mrs. Wilson should consult an attorney. Mr. Wilson, Lloyd's #016949K, participated during the years of account, 1977-1993 in syndicates 126,127,190,122, 203, 206, 207, 209, 288, 428, 210, 212, 293, 925, 950, 960, 998, 546, 561, 718, 662, 317, 418, 437, 51, 861, 799,1173,1232, 1215, 1066,1067,1068. Mrs. Wilson, Lloyd's #029S65X, participated during the years of account 1982-1992 in syndicates 206, 209, 288, 428, 662, 210,122, 546, 598, 960, 925, 866, 330, 204, 204, 212, 219, 700,701,661,1028,503 and 37. The Court has set a deadline of June 17, 2003, for the filing of Proofs of Claim. Failure to file a timely claim may lead to the claim being disallowed and to the discharge of any liability of the claim. Complaints to determine dischargeability of certain, debts must be filed on or before May 13.

⁶⁶² See Insolvency Act 1986, s.1(1).

⁶⁶³ See definition at Insolvency Act 1986, s.247(2).

⁶⁶⁴ Viz., a 'company' within Companies Act 1985, s.735: Insolvency Act 1986, s.251, last paragraph.

⁶⁶⁵ See generally Insolvency Act 1986, s.1A(1)-(2) and the detailed provisions specifically on moratorium at *ibid.*, Sch. A1. Note: (1) the qualifications at *ibid.*, §2-3. A corporate SYA participant does not fall within *ibid.*, Sch. A1, §2(2) (moratorium in relation to, among others, an insurer). Though it does effect or carry out contacts of insurance (*ibid.*, §2(2)(a)), it is exempt in relation to that activity — see Regulated Activities Order, §13 — from the FSMA 2000, s.19(2) 'general prohibition' (*op. cit.*, §2(2)(a)) (the 'but' in *ibid.*, Sch. A1, §2(2)(a) appears to be error for 'and'); (2) the exclusions at *ibid.*, §§4(1), 4A (and see *ibid.*, §4D), 4B and 4C. For example, a moratorium is not available where the company is already subject to a CVA (*ibid.*, §4(1)(d)) or a variety of other insolvency or related processes (listed at *ibid.*, §4(1)(a)-(g)).

⁶⁶⁶ See ¶2.50.

ticipate as a creditor in the process, and will save himself considerable trouble if he positively does not become involved. In not-BBSN circumstances, the assured's-at-Lloyd's calculation will be based on the size of the SYA participant's line. The CVA supervisor⁶⁶⁷ will need to do the usual due diligence on all the company's FO and BO liabilities arising under exactly which instruments, including the consideration array of BO funding instruments, and work closely with relevant BO creditors to ensure that those liabilities are discharged only once and that captive assets are used before free assets.

FSA

- 2.139** The FSA's FSMA 2000, s.356(1)⁶⁶⁸ right to adversely intervene in the CVA of an *ibid.*, s.19(1)(a) 'authorised person' does not apply to the CVA of a corporate SYA participant.⁶⁶⁹

of the Corporation

- 2.140** A CVA is presently not available to the Corporation: (1) it is not a 'company' as defined;⁶⁷⁰ (2) it is not presently included among the other entities⁶⁷¹ to which the Treasury is empowered⁶⁷² to extend Insolvency Act 1986, Part I.

IVA OF A SYA PARTICIPANT

principle

- 2.141** A natural SYA participant appears to be as entitled as any other eligible natural person to propose and enter into an IVA.⁶⁷³ Various Members have entered into IVAs, before and since R&R. The process is an 'insolvency event'⁶⁷⁴ for BO self-regulatory purposes.

appropriateness

- 2.142** A natural insolvent's personal and financial dynamics are not those of a corporate insolvent. Personal considerations, and creditors other than merely FO and BO at Lloyd's, will figure more prominently. But there is potential for the same FO-BO, BBSN and not-BBSN confusion, and necessity for the same punctilious due diligence concerning the insolvent's FO and BO liabilities and for the identification and discharge of the precise and particular instruments under which they arise. A natural SYA participant's insolvency in BBSN circumstances, however widely advertised by Wilson notice, will attract the attention only of the most misguided assured-at-Lloyd's. In not-BBSN circumstances, he will be even less relevant, more elusive, and probably susceptible to centralised collection by self-regulators-at-Lloyd's and their agents.

⁶⁶⁷ See Insolvency Act 1986, Sch. A1, §39(2).

⁶⁶⁸ As substituted for the original FSMA 2000, s.356(1) by Insolvency Act 2000, s.15(3)(a).

⁶⁶⁹ The corporate SYA participant is a FSMA 2000, s.19(1)(b) 'exempt person': see Regulated Activities Order, §13.

⁶⁷⁰ See Insolvency Act 1986, s.251, last paragraph read with Companies Act 1985, s.735.

⁶⁷¹ See Enterprise Act 2002, s.255(1).

⁶⁷² By Enterprise Act 2002, s.255(2)(a).

⁶⁷³ See generally Insolvency Act 1986, Part VIII. On the so-called 'fast-track' IVA, see *ibid.*, ss.263A-263G. For the Secretary of State's statutory power to extend the 'fast-track' procedure to cases other than those set out at *ibid.*, s.263A, see Enterprise Act 2002, s.264(2)-(4).

⁶⁷⁴ See ¶2.50.

FSA

- 2.143** The FSA is entitled to be heard on an Insolvency Act 1986, s.253 application by an 'authorised person',⁶⁷⁵ and to attend any *ibid.*, s.257 creditors' meeting,⁶⁷⁶ and to apply to the court to challenge the meeting's result⁶⁷⁷ and or the IVA's implementation.⁶⁷⁸ Presently, neither a Member nor a SYA participant is such a person.⁶⁷⁹

PROVISIONAL LIQUIDATION

- 2.144** Provisional liquidation has been used as a prelude to a s.425 scheme;⁶⁸⁰ administration⁶⁸¹ may be preferred now.

RECEIVERSHIP

- 2.145** This is outside the scope of the present Edition. It is addressed in the Second Edition.

S.425 SCHEME OF ARRANGEMENT*of the Corporation*

- 2.146** The Corporation, being not a company⁶⁸² is not susceptible to a s.425 scheme of arrangement in relation to its own personal liabilities.

of a syndicate or SYA

- 2.147** Neither a SYA⁶⁸³ nor a syndicate⁶⁸⁴ is capable of being schemed.

*of a SYA stamp front company***in principle**

- 2.148** Insolvency Act 1986 is not exhaustive of the insolvency processes available in principle to an insolvent corporate SYA participant:⁶⁸⁵ a cut-off, reserving or hybrid scheme under Companies Act 1985, s.425 (previously Companies Act 1948, s.206) is available to a qualifying company being wound up — indeed, on the liquidator's or administrator's own application to the court⁶⁸⁶ — as much as to a solvent one. A s.425 scheme, which includes various types of share capital reorganisation⁶⁸⁷ and transfers to another company,⁶⁸⁸ is available only to a 'company'⁶⁸⁹ liable to be

⁶⁷⁵ FSMA 2000, s.357(1).

⁶⁷⁶ FSMA 2000, s.357(3). Notice of the meeting's 'result' must be given to the FSA: *ibid.*, s.357(4).

⁶⁷⁷ FSMA 2000, s.357(5)(a) read with Insolvency Act 1986, s.262.

⁶⁷⁸ FSMA 2000, s.357(5)(b) read with Insolvency Act 1986, s.263.

⁶⁷⁹ See Regulated Activities Order, §13.

⁶⁸⁰ See for example *Re English and American Insurance Co. Ltd.* [1994] 1 BCLC 649.

⁶⁸¹ See Insolvency Act 1986, s.8 and *ibid.*, Sch. B1.

⁶⁸² See ¶2.11.

⁶⁸³ See ¶2.110.

⁶⁸⁴ See ¶2.114 *et seq.*

⁶⁸⁵ Given the myth, misunderstanding and misconception endemic among assureds-at-Lloyd's, it is particularly important to take genuinely expert advice before voting (as under Companies Act 1985, s.425(2)) on any insolvent process involving the Lloyd's enterprise.

⁶⁸⁶ See Companies Act 1985, s.425(1), (2).

⁶⁸⁷ Companies Act 1985, s.425(6)(b).

⁶⁸⁸ See Companies Act 1985, s.427.

⁶⁸⁹ Defined at Companies Act 1985, s.735.

wound up under Companies Act 1985.⁶⁹⁰ Since none is an *ibid.*, s.735 'company', the following cannot be schemed: a natural SYA participant, the Corporation,⁶⁹¹ a syndicate, a SYA (however corporate the latter's participant(s)). A s.425 scheme is a fashionable running-off medium among insolvent conventional UK insurance companies. Since no assured-at-Lloyd's would ordinarily be involved in the process in BBSN circumstances, no insurance-peculiar issue is likely to arise directly. If envisaged as a time- and cost-saving precursor⁶⁹² to dissolution, the disappearance of the corporate SYA participant as the assured's-at-Lloyd's conduit to relevant claims payment securitisation trust and other funds should be taken into account.

not an 'insurer'

- 2.149** A corporate SYA participant (including a foreign one⁶⁹³), being neither a statutory 'insurer' nor a FSA "insurer", appears to be free to construct a s.425 cut-off, reserving or hybrid, solvent or insolvent, scheme in relation to its relevant FO and BO liabilities free of all insurer-peculiar statutory and FSA-regulatory provisions, and to choose not to discriminate, for class or other purposes, between insurance and general assets and liabilities. Similarly, there appears to be no law preventing a natural SYA participant from scheming his insurance liabilities via an appropriate corporate vehicle. And what can be done at the level of sole SYA participant can in principle equally be done — though an increasingly intricate and disruptive⁶⁹⁴ practical and professional⁶⁹⁵ undertaking — at the level of a particular stamp, all stamps on a particular slip, and all stamps of a particular class.

practice

- 2.150** Creating a properly authorised and certified⁶⁹⁶ bucket company as repository for the relevant liabilities (divided if appropriate into classes⁶⁹⁷) of one or more SYA participants⁶⁹⁸ (presumably at least at stamp level) — query if the device works equally at syndicate or slip level — is apparently the subject of current discussions in the London market. The liabilities would be formally transferred⁶⁹⁹ by a lone

⁶⁹⁰ Companies Act 1985, s.425(6)(a).

⁶⁹¹ Nor is the Corporation presently included among the other entities (see Enterprise Act 2002, s.255(1)) to which the Treasury is empowered (by Enterprise Act 2002, s.255(2)(c)) to extend s.425.

⁶⁹² See for example *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573.

⁶⁹³ See *Re Drax Holdings Ltd; Re InPower Ltd.* [2003] EWHC 2743 (Lawrence Collins J).

⁶⁹⁴ At its most superficial, such a radical reconfiguration of the enterprise would require the permanent cessation of self-regulators'-at-Lloyd's insistent blandishments of superior securitisation.

⁶⁹⁵ The exercise would require, on the professional adviser's part, the deepest knowledge of all relevant FO-MO-BO, PU and CU aspects of the Lloyd's enterprise.

⁶⁹⁶ See (for example) FSMA 2000, s.111(2)(a) read with *ibid.*, Sch. 12, §1(1) etc.

⁶⁹⁷ See Companies Act 1985, s.425(1), (2), s.426(1) etc.,

⁶⁹⁸ Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirement on Applicants) Regulations 2001, §§3, 4(b), 5(a), 5(b) use the word 'member', infelicitously: see §2.52 *et seq.*

⁶⁹⁹ See FSMA 2000, Part VII read with *ibid.*, s.323:-

The Treasury may by order provide for the application of any provision of Part VII ['Control of business transfers'] (with or without modification) in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society or former underwriting members.

read with Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 (SI 2001/3626) (reproduced at Appendix II). *Ibid.* applies the following to a transfer of liabilities incurred at Lloyd's : (1) (*per ibid.*, §3(a)) FSMA 2000, ss.104 and 107-114; (2) (*per op. cit.*, §3(b)) Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625) (reproduced at Appendix II), as being made under FSMA 2000, s.108; (3) (*per op. cit.*, §3(c)) FSMA 2000, Sch. 12 ('Transfer schemes: certificates'), Part I ('Insurance business transfer schemes'). And see the detailed provisions at SUP, §18.2.

transferor, acting on behalf of the SYA participants⁷⁰⁰ concerned, appointed by the Council⁷⁰¹ (among other customised modifications⁷⁰²) — to the bucket, enabling any corporate SYA participant transferee to be then wound up and dissolved, and only then would BO creditors be invited to vote⁷⁰³ on it. Query what would happen if they did not approve it. Before the vote, the usual due diligence must be performed to identify and flush out all FO and BO creditors and liabilities — the latter arising under a multiplicity of BO instruments rarely if ever connected to a specific FO insurance contract — and utilise and liberate all relevant FAL. It should be particularly noted that discharge of a FO insurance liability has no effect whatever on the continuing existence of the PTD-premium and of the various BO liabilities which that deed requires the SYA participant to fund, including payment to PU and CU funds. Exhaustive due diligence must be timeously performed on every relevant FO and BO contractual and deed liability to which the relevant liable SYA participant is subject, including in order to ascertain the mechanics of extricating him from that liability and of discharging every relevant component of every relevant underlying instrument. An exhaustive discharge, release and refund checklist must be compiled. Close cooperation is required with self-regulators-at-Lloyd's.

assured's-at-Lloyd's approach

- 2.151** Run-off at Lloyd's in BBSN circumstances is (at least in principle) always solvent. The assured-at-Lloyd's — fully securitised at Lloyd's in relation to every subscriber (not just one), and able to commute through the usual channels with every subscriber to a slip (not just one) — has no reason to discover or heed the personal financial condition of any SYA participant *solus*. It may be expedient for the latter (especially if unable to buy conventional RTC other than from itself) to seek to extricate itself quickly and cheaply from its liabilities, but it will seldom be rational for any assured-at-Lloyd's to indulge the process, especially line by line (absent dire financial need or a particularly large line).⁷⁰⁴ Upon a valid claim materialising under his insurance contract made at Lloyd's, in BBSN circumstances there can then be few if any sound commercial reasons for the assured-at-Lloyd's to forego payment of the 100% vouchsafed to him by the Golden Rule.

⁷⁰⁰ Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, §4(b).

⁷⁰¹ See Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, §§3 and 4(b).

⁷⁰² For example (*per* the fn. immediately above): (1) *per* FSMA 2000, s.104, the transfer must be the subject of an *ibid.*, s.111(1) order; (2) *per ibid.*, s.107, an application to the court may be made for the order; (3) *per ibid.*, s.108 read with Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, §3, notices must be published; (4) *per ibid.*, s.109, a scheme report must be prepared; etc.

⁷⁰³ See Companies Act 1985, s.425(2) (reproduced at Appendix II). Concern, heard expressed by US assureds that a solvent scheme enables a solvent insurance company to evade paying claims in full, is allayed by the need for agreement of a majority in number representing at least three-quarters in value of the company's relevant liabilities.

⁷⁰⁴ If the scheme to any material extent seeks to dragoon a not-yet-claimant assured-at-Lloyd's into a commutation, the putative scheme's putative administrators (perhaps provisional liquidators), in close conjunction with self-regulators-at-Lloyd's and external insurance regulators, will first need to make the frankest prior disclosure to the assured-at-Lloyd's of his 'Golden Rule' recourse rights — a possibly tall order given decades of mythologizing and misunderstanding now thoroughly infiltrated into statutes, statutory instruments, FSA rules, case law and certain publications of the Lloyd's enterprise. That the SYA stamp's insurance liabilities happen all to be owed to reinsurers does not in principle dilute the disclosure required. That professional advisers happen to have canvassed assureds-at-Lloyd's uninformed of their Golden Rule recourse rights is meaningless.

WINDING UP

*of the Corporation
point*

- 2.152** In some not-BBSN circumstances, it may be appropriate, as an alternative to a scheme designed to promote its survival, to repeal the Council's Lloyd's Act 1911, s.7(c) discretion, wind up the Corporation, realise all its assets, and place them at the disposal of the Corporation's insolvency guardian for the benefit of assureds-at-Lloyd's.

generally; new Act; Corporation general meeting

- 2.153** 'Dissol', 'liquidat' and 'wind' do not occur anywhere in Lloyd's Acts 1871-1982; nor do those Acts otherwise expressly⁷⁰⁵ envisage or provide for the Corporation's death; nor is there any express provision (or particular threshold debt, or other express ground⁷⁰⁶) specifically for winding up the Corporation in any other UK statute. Presumably winding up may be provided for or effected by a further Act (Parliament presumably taking the opportunity to bring the Corporation within the provisions of appropriate existing insolvency legislation) or, perhaps (and to some extent the same process⁷⁰⁷), by resolution of Members in Corporation general meeting.⁷⁰⁸

Insolvency Act 1986, s.221 generally

- 2.154** On whether Insolvency Act 1986, s.221⁷⁰⁹ ('Winding up of unregistered companies') applies to the Corporation: (1) the Corporation is not a 'company',⁷¹⁰ registered or unregistered (if the Corporation be held for some reason to be an 'unregistered company', arguably liquidation further to *ibid.*, s.221 could be voluntary⁷¹¹ or compulsory); (2) the Act does elsewhere distinguish between a company and a corporation⁷¹² (and between different circumstances of companies⁷¹³); (3) *ibid.*, s.221

⁷⁰⁵ The failure of the Corporation's Lloyd's Act 1911, s.4 objects is an inherent ground.

⁷⁰⁶ The Council acting *ultra vires* under Lloyd's Act 1982, s.6(1) and (2) — for example, failing to self-regulate consistently with the Corporation's second object — is a mere regulatory rather than constitutional matter.

⁷⁰⁷ A new Lloyd's Bill would presumably have to be Wharnecliffed as were the Bills which evolved into Lloyd's Act 1982.

⁷⁰⁸ The Corporation's liquidation was proposed in 1993.

⁷⁰⁹ Historically see for example Companies Act 1929, s.338.

⁷¹⁰ Insolvency Act 1986, s.221(1)'s two principal ingredients are 'unregistered' and 'company'. The Corporation is unregistered but it is not a 'company'. The bodies considered in *Re Drax Holdings Ltd*; *Re Inpower Ltd*. [2003] EWHC 2743 (Ch), [2004] 1 BCLC 10 (Laurence Collins J) were not corporations but companies incorporated under (Cayman Islands and Jersey) legislation relating specifically to companies. For a wide *obiter* construction, see *Re Paramount Airways Ltd*. [1992] BCLC 710, [1993] Ch. 223, 240 (Nicholls V-C: 'Section 221 provides that an unregistered company may be wound up under the 1986 Act. This embraces all overseas companies ...').

⁷¹¹ Insolvency Act 1986, s.221(4) read with *ibid.*, s.436 (definition of 'EC Regulation') and with Insolvency Regulation, §1.2 provides that an 'insurance undertaking' can be wound up voluntarily under s.221. On something at Lloyd's being an 'insurance undertaking', see for example (not Regulated Activities Order, §10 but) First Non-Life Directive, §8.1 ('insurance undertaking') and First Life Directive, §8.1 ('assurance undertaking'), §(a) 'the association of underwriters known as Lloyd's'. Whether this phrase refers to Members and or SYA participants collectively (and, if so, how collectivised and by what criteria), or to the Corporation, is unclear. As used in (for example) First Life Directive, §19(b), the phrase seems to refer to certain SYA participants collectively, or it could refer to relevant components of the Lloyd's enterprise as represented by the Corporation especially to the extent that the Corporation may have personal liability for relevant SYA participants' insurance liabilities. If the EU Council understood exactly what it was regulating, presumably it would have made itself clear.

⁷¹² See for example Insolvency Act 1986, s.432 ('Offences by bodies corporate').

itself expressly⁷¹⁴ refers to a business form other than a company; (4) other enactments expressly apply *ibid.*, s.221 to particular business forms other than the company, such as (for example) an insolvent partnership,⁷¹⁵ an agricultural marketing board,⁷¹⁶ a friendly society,⁷¹⁷ an open-ended investment company;⁷¹⁸ and members of recognised investment exchanges,⁷¹⁹ and others⁷²⁰ (5) *ibid.*, s.220 ('Meaning of "unregistered company"'), though not exclusory, does not contain any examples which appear to apply⁷²¹ to the Corporation.

FSA's petition: FSMA 2000, s.367

- 2.155** If 'body' includes a statutory corporation aggregate, the FSA is empowered under FSMA 2000, s.367(1)(a)⁷²² to petition the court for an order winding up the Corporation. *Ibid.* s.367(1) read with *ibid.*, s.367(3)(a)'s mention of Insolvency Act 1986, s.221 appears to be the only measure clearly connecting the Corporation to Insolvency Act 1986, s.221, and necessarily only in the FSMA 2000, s.367(1)(a)-(c) context. The court may wind up the 'body' if: (1) unable to pay 'its' debts within Insolvency Act 1986, s.221(5).⁷²³ It is treated as so unable if (among other things⁷²⁴) it 'is' in default of an obligation to pay a sum due and payable under an 'agreement';⁷²⁵ or (2) of the opinion that it is 'just and equitable'.⁷²⁶ The court presumably is generally⁷²⁷ not confined to considering only the authorised person's 'regulated activities'. FSMA 2000, s.377 ('Reducing the value of contracts instead of winding up') as an alternative to *ibid.*, s.367-precipitated liquidation presumably does not apply unless the FSA's petition is made under FSMA 2000, s.367(1)(c) and the Corporation is found to have somehow been conducting a Regulated Activities Order, §10 'regulated activity' (insurance contracts as a principal).⁷²⁸

⁷¹³ See for example Insolvency Act 1986, s.1(4).

⁷¹⁴ See Insolvency Act 1986, s.221(6) (trustee savings bank).

⁷¹⁵ See Insolvent Partnerships Order 1994 (SI 1994/2421), Sch. 3, Part I; *ibid.*, Sch. 4, part I.

⁷¹⁶ See Agricultural Marketing Act 1958, s.3(3); *ibid.*, Sch. 2, §4.

⁷¹⁷ See Friendly Societies Act 1992, s.52(9).

⁷¹⁸ Open-Ended Investment Companies Regulations 2001 (SI 2001/1228), §31.

⁷¹⁹ See Companies Act 1989, s.182.

⁷²⁰ See for example Companies Act 1989, s.182(1)(a) and (4)(a) (member of recognised investment exchange or recognised clearing house) and *ibid.*, s.182(1)(b) and (4)(b) (person by whom a market charge has been granted).

⁷²¹ For example, the Corporation, being one person, cannot be an 'association'.

⁷²² The FSA has a similar power under *ibid.*, s.367(1)(c) in relation to the Corporation carrying on a Regulated Activities Order, §10(1) or (2) activity (insurance as a principal) without authorisation. The Corporation appears not to subscribe to any insurance contract made at Lloyd's, but some argument could be devised based on its apparent personal liability to discharge SYA participants' insurance liabilities.

⁷²³ FSMA 2000, s.367(3)(a). And see further Insolvency Act 1986, ss.222-4.

⁷²⁴ See FSMA 2000, s.367(3)(a) read with Insolvency Act 1986, s.221.

⁷²⁵ FSMA 2000, s.367(4). Per *ibid.*, s.(5), 'agreement' means 'an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the body'. And see FSMA 2000, s.315 etc.

⁷²⁶ FSMA 2000, s.367(3)(b); see similarly Insolvency Act 1986, s.221(5)(c).

⁷²⁷ An exception is FSMA 2000, s.367(3)(a) read with *ibid.*, s.367(4).

⁷²⁸ The court's exercise of its FSMA 2000, s.377(2) power following an *ibid.*, s.367(1)(c) petition singularly relieves from legal liability a person conducting a Regulated Activities Order, §10 'regulated activity' unlawfully. Potential exercise of the power highlights the importance of an assured due-diligencing the regulatory and financial status of his insurer.

debts and contributories

- 2.156** If the Corporation *is* liable to be wound up under Insolvency Act 1986, s.221, presumably the liquidation will encompass all its debts and liabilities,⁷²⁹ and *ibid.*, s.226 will govern contributories.

of a syndicate or SYA

- 2.157** None of a syndicate,⁷³⁰ SYA⁷³¹ or SYA stamp⁷³² is capable of being wound up, whether because of Insolvency Act 1986, s.220, GAAP accounting, one-YOR accounting or on any other reasoning.

of a corporate SYA participant principle

- 2.158** FSMA 2000, Part XXIV ('Insolvency') contains various provisions relating to liquidation of an 'insurer' as that term is defined in Financial Services and Markets Act 2000 (Definition of "Insurer") Order 2001.⁷³³ Since a corporate SYA participant is not⁷³⁴ an 'insurer' as so defined, those restrictions do not apply to it, including in relation to liabilities arising from its sale of life products. Nor is a corporate SYA participant an "insurer" *per* either FSA Glossary⁷³⁵ or IPRU(INS).⁷³⁶ Insurers Winding Up Rules do not apply to it;⁷³⁷ nor do the Reorganisation Regulations;⁷³⁸ nor, arguably, does the Reorganisation Directive.⁷³⁹ If happening to be in liquidation in not-BBSN circumstances, the Reorganisation Directive will still not⁷⁴⁰ apply to it. It is possible that the measure⁷⁴¹ implementing the directive in relation to the Lloyd's enterprise will make provision for an individual corporate SYA participant's liquidation.

notification obligations

- 2.159** Every corporate SYA participant — subject to the same requirement as the natural SYA participant to conduct, and run off, his insurance business only through a managing agency — is required to 'forthwith' notify his stamp's managing agency if (for example): (1) a petition is presented or filed in any court in respect of its bank-

⁷²⁹ See Insolvency Act 1986, s.226(1).

⁷³⁰ See ¶2.113 *et seq.*

⁷³¹ See ¶2.110.

⁷³² See ¶2.110.

⁷³³ SI 2000/2634: FSMA 2000, s.355(2) read with *op. cit.*, §2.

⁷³⁴ See Financial Services and Markets Act 2000 (Definition of "Insurer") Order 2001, §2(a): the corporate SYA participant does conduct a Regulated Activities Order, §10 activity as a principal but is a FSMA 2000, s.19(1)(b) 'exempt person' in relation thereto: see Regulated Activities Order, §13.

⁷³⁵ Per FSA Glossary, "insurer": 'a "firm" with "permission" to "effect" or "carry on contracts of insurance" (other than a "bank").'

⁷³⁶ Per IPRU(INS), Chapter 11, Part I, "insurer": 'a "firm" with permission under the "Act" to effect or carry out "contracts of insurance", other than a bank'.

⁷³⁷ See Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a). The exemption appears to be at FSMA 2000, s.316(1).

⁷³⁸ Reorganisation Regulations, §2(1), definition of 'UK insurer'.

⁷³⁹ See Reorganisation Directive, §2(a), definition of 'insurance undertaking' read with First Non-Life Directive, §8.1(a) (and First Life Directive, §8.1(a)) read with FSMA 2000, s.316(1) and (3) (special external insurance regulatory treatment for companies which happen to be SYA participants).

⁷⁴⁰ Because the corporate SYA participant is (on present law) still not in a relevant authorised form prescribed in First Non-Life Directive §8.1(a), and First Life Directive, §8.1(a).

⁷⁴¹ See ¶P15 *et seq.*

ruptcy, winding-up or other insolvency or which seeks any reorganisation, arrangement, composition, administration, liquidation, dissolution or similar relief under any present or future statute, law or regulation;⁷⁴² (2) there occurs in relation to the corporate SYA participant any of the events specified in SCA 1, §11.7(b).⁷⁴³

FO effect: insolvency guardian as SYA participant

- 2.160** In BBSN circumstances, liquidation of an *originalis* does not generally novate or otherwise vary or amend the insurance contract: the SYA participant, however insolvent (*cf.* dissolved) and even if a substantial spoastic participant on a mono-slip, remains⁷⁴⁴ (as does an insolvent natural SYA participant) a conduit to relevant claims payment securitisation funds (available to discharge that SYA participant's relevant insurance liabilities whether it is in liquidation or not) in the ordinary way, consistent with its FO *solus* irrelevance in such circumstances (collection in not-BBSN circumstances from a corporate SYA participant in liquidation is a different matter). Nor should its liquidation result in a run on the trust fund on account of that SYA participant: the insolvency is completely irrelevant to the trust moneys' availability, and to the Lloyd's enterprise's obligation to keep the fund above its prescribed minimum amount.

termination of SCA 1

- 2.161** SCA 1, §1.1's definition of 'Corporate Member' includes 'any person to whom the Corporate Member's property may pass by operation of law in any jurisdiction on bankruptcy, reorganisation or otherwise'. SCA 1, §11.⁷⁴⁵ empowers each managing agency of each of the Member's SYA stamps to terminate SUA 1 on not less than 48 hours written notice — a power that each managing agency may choose to exercise differently, there being no relevant coordinating provision — in various insolvency-related events including if (for example) the corporate SYA participant makes or proposes any composition with its creditors or otherwise acknowledges its insolvency;⁷⁴⁶ a proposal is made in respect of it under Insolvency Act 1986, s.2 (CVA);⁷⁴⁷ a bankruptcy order is made against it by the due process of law of any country;⁷⁴⁸ it is adjudicated bankrupt, or adjudicated or declared insolvent, by the due process of law of any country;⁷⁴⁹ an order is made, a resolution is passed or an act, decree or other instrument is passed for its winding up or dissolution;⁷⁵⁰ a receiver, trustee or analogous officer is appointed in respect of all or any material part of its property or assets;⁷⁵¹ it or its directors file in any court a petition in respect of its bankruptcy, winding up or other insolvency, or seek any reorganisation, dissolution or similar relief;⁷⁵² or if there occurs an event in any jurisdiction analogous to

⁷⁴² SUA 1, §7.6(b).

⁷⁴³ SUA 1, §7.6(a).

⁷⁴⁴ *Cf. Ackman v Policyholders Protection Board* [1992] 2 Lloyd's Rep. 321 (CA); *Transit Casualty v Policyholders Protection Board* [1992] 2 Lloyd's Re. 358 (Hoffmann J).

⁷⁴⁵ *Q.v.* it and SCA 1, §11.8 for detailed provisions.

⁷⁴⁶ SCA 1, §11.7(b)(i).

⁷⁴⁷ SCA 1, §11.7(ii).

⁷⁴⁸ SCA 1, §11.7(iii).

⁷⁴⁹ SCA 1, §11.7(iv).

⁷⁵⁰ SCA 1, §11.7(v).

⁷⁵¹ SCA 1, §11.7(vii).

⁷⁵² SCA 1, §11.7(viii).

any of the foregoing.⁷⁵³ When the managing agency does exercise its SCA 1, §11.7 power to terminate SCA 1, its 'authority'⁷⁵⁴ to 'accept risks' on behalf of the corporate SYA participant also terminates,⁷⁵⁵ except in relation to (for example): (1) variations and extensions of existing risks effected under its 'customary and usual powers';⁷⁵⁶ (2) inward-RTC.⁷⁵⁷

contractual authority to run off continues

- 2.162** Mere SUA 1 automatic or elective termination does not involve novating any insurance contract already made, or otherwise extricating the insolvent SYA participant from his liabilities under it (query the relationship between profit and loss and underlying liability, which appears to continue). The managing agency retains contractual authority to run off the insolvent SYA participant's liabilities notwithstanding SUA 1's apparent termination for other purposes.⁷⁵⁸ When the managing agency does exercise its SUA 1, §11.7 power to terminate SCA 1, its 'authority'⁷⁵⁹ to 'accept risks' on behalf of the natural SYA participant also terminates,⁷⁶⁰ except in relation to (for example): (1) variations and extensions of existing risks effected under its 'customary and usual powers';⁷⁶¹ (2) inward-RTC.⁷⁶²

calculation of profit and loss

- 2.163** For purposes of calculating the profit and loss of each participant on the relevant YA, the insolvent SYA participant is automatically⁷⁶³ (whether or not the managing agency chooses to terminate SCA 1 for bankruptcy under *ibid.*, §11.7(b)) treated as having not participated on the SYA at all, its profit or loss (however large) being apportioned among the not-bankrupt survivors, who consent to the arrangement.⁷⁶⁴

insurance contracts

- 2.164** FSMA 2000, s.377 empowers the court, as an alternative to making a winding-up order, to reduce, on such terms as the court thinks fit, the insurance⁷⁶⁵ contractual

⁷⁵³ SCA 1, §11.7(ix).

⁷⁵⁴ SCA 1, §11.8.

⁷⁵⁵ See generally SCA 1, §11.8.

⁷⁵⁶ SCA 1, §11.8(a). Relevant customs, usages and practices at Lloyd's are discussed in *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁵⁷ SCA 1, §11.8 (b); and see the further provisions on inward-RTC at *ibid.*, (c).

⁷⁵⁸ See generally SUA 1, §11.8 *et seq.*

⁷⁵⁹ SUA 1, §11.8.

⁷⁶⁰ See generally SUA 1, §11.8 *et seq.*

⁷⁶¹ SUA 1, §11.8(a). Relevant customs, usages and practices at Lloyd's are discussed in *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁶² SUA 1, §11.8 (b); and see the further provisions on inward-RTC at *ibid.*, (c).

⁷⁶³ See SCA 1, §14.2(a)'s words '(a) Subject to paragraphs (aa) and (ab) of this clause, in the event of the death or bankruptcy of a member of the Managed Syndicate, or ... [etc.]'. *Ibid.*'s 'in the event of the membership of a member of the Managed Syndicate being terminated by operation of law or by virtue of the provisions of clause 11.7(b) of the relevant Managing Agent's Agreement otherwise than at the end of any year' are repetitious to the extent that termination under *ibid.*, §11.7 occurred because of bankruptcy: *ibid.*, 14.2(a) already applies.

⁷⁶⁴ SCA 1, §14.2(a), *q.v.* and *ibid.*, §14.2(aa) and (ab) for detailed provisions.

⁷⁶⁵ FSMA 2000, s.377(2): "insurer's contracts". For precursor, see Insurance Companies Act 1982, s.58 ('contracts of the company'), held in *Re Capital Annuities Ltd.* [1979] 1 WLR 179 (Slade J) to mean (*cf.* include) insurance contracts.

liabilities of an 'insurer' unable to pay its debts,⁷⁶⁶ a power which the court will use to protect the company from its existing creditors, not to embolden it to acquire new creditors.⁷⁶⁷ The power is not exercisable in relation to a corporate SYA participant because it is not⁷⁶⁸ an 'insurer' as defined.

⁷⁶⁶ The test of an "insurer's" inability to pay its debts under FSMA 2000, s.377(1) is presumably *ibid.*, s.367((3)(a) read with Insolvency Act 1986, s.123.

⁷⁶⁷ *Re Capital Annuities Ltd.* [1979] 1 WLR 179 (Slade J).

⁷⁶⁸ See FSMA 2000, s.355(2) read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2(a) read with Regulated Activities Order, §13 read with FSMA 2000, s.327(5) etc.

3: INSOLVENCY AT EQUITAS RE AND EQUITAS LTD.

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Sub-chapter 1: orientation

EQUITAS RE'S INSOLVENCY

generally

Equitas Re's susceptibility to insolvency law

- 3.1** None of the Equitas enterprise's various entities or relevant individuals has any express or inherent exemption from ordinary English corporate or insurance insolvency law.¹ For example, the Insolvency Proceedings Regulation does not² apply to either Equitas Re or Equitas Ltd. Neither the Reorganisation Directive (inferentially³) nor the Reorganisation Regulations (expressly⁴) applies to either Equitas Re and Equitas Ltd. The Insurers Winding Up Rules do⁵ apply to Equitas Re and Equitas Ltd.

secret 'scope of permission' notices

- 3.2** The FSA's so-called 'scope of permission' notices (which replaced as at December 1, 2001 the DTI's Notices of Requirements) for Equitas Re and Equitas Ltd. — apparently not public documents⁶ — may confer some secret privilege or enable the FSA to bestow some latitude in relation to either company's solvency or insolvency⁷ (it is believed⁸ that each company is required to make certain private FSA filings). The apparent regulatory secrecy is not otherwise explicable.

¹ See for example Insolvency Act 1986; numerous provisions in Companies Acts 1985 and 1989; Insolvency Rules 1986; Insurers Winding Up Rules; Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (2001 SI 2634).

² Insolvency Proceedings Regulation, §2.

³ Reorganisation Directive, §2(a) read with First Non-Life Directive, §1.1 and *ibid.*, §6 ('direct insurance') — it is curious that the First Non-Life Directive, which expressly excludes certain insurance products (at *ibid.*, §2) and insurance undertakings (at *ibid.*, §3) excludes reinsurance and reinsurers only inferentially, and somewhat contradictorily (see *ibid.*, Annex, §A13 and 16, which are capable of insurance reinsurance products: and see *A.-G. v Forsikringsaktieselskabet National* [1925] AC 619 (HL); *D. R. Insurance Co. v Seguros America Banamex* [1993] 1 Lloyd's Rep. 120 (Hamilton QC); *Re NRG Victory Reinsurance Ltd.* [1995] 1 WLR 239 (Lindsay J)).

⁴ Reorganisation Regulations, §2(1), definition of 'UK insurer'.

⁵ See Insurers Winding Up Rules, §2(1) definition of 'insurer' read with Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634), §2 read with Regulated Activities Order, §10(1) and (2).

⁶ FSA source.

⁷ And see FSA's July 18, 2001 written response to the Author's questions:-

Golden Rule and EquitasRe-RTC misunderstood

- 3.3 The assured's-at-Lloyd's recourse on an insurance contract reinsured by Equitas Re, and self-regulators'-at-Lloyd's 'chain of security' blandishments specifically in relation thereto, are discussed elsewhere.⁹ Lloyd's brokers' practice of broking claims on EquitasRe-reinsured insurance contracts at Equitas Re instead of at Lloyd's; the apparent absence of a repository for or redress in relation to such claims at Lloyd's; the absence of clear disclosure by self-regulators-at-Lloyd's and external insurance regulators of the Golden Rule in relation to EquitasRe-reinsured liabilities; and the credulity and technical ignorance of US assured-side lawyers have contributed — perhaps together with the juxtaposition in Equitas Re of reinsurance and run-off functions in relation to the same liabilities — to the misapprehension that the Golden Rule has somehow ceased to apply in relation to those liabilities. In reality, no overt or covert due process in any jurisdiction has extricated any EquitasRe-reinsured SYA participant — either as *solus* or as conduit to relevant claims payments securitisation funds including those of Members as contributories to an available Central Fund — from any EquitasRe-reinsured insurance liability. In particular (for example), EquitasRe-RTC¹⁰ (*cf.* conventional RTC) has no extricatory effect whatever on any EquitasRe-RTCD SYA participant, the purpose and effect to date of RTC being to confine the liabilities within, so as to maintain the assured's-at-Lloyd's seamless recourse to, the Lloyd's enterprise. Indeed, the burden or recourse is entirely in the opposite direction, *viz.*, away even from the EquitasRe-reinsured SYA participant *solus* — who is not regulatorily required to have any assets in any jurisdiction for any purpose — towards full securitisation (as the Council knows) at Lloyd's, hence (for example) the continuing provision of relevant MO CU claims payment securitisation funds,¹¹ and various BO acknowledgments¹² in *SOD* of continuing enterprise-level liability notwithstanding EquitasRe-reinsurance. Self-regulators'-at-Lloyd's manoeuvres inconsistent therewith, such as (in the BO) NCFB, §§8(3)(b) and 8(4)(b), and (in the FO) recent resiling¹³ (after the event anyway) from previously unqualified 'chain of security' blandishments, are merely suggestive of multi-level bad faith by self-regulators-at-Lloyd's rather than indicative of Golden Rule abrogation. In particular (for example):-

Does the FSA practice extra vigilance for sensitive insurance companies such as Equitas, or companies that are close to insolvency, or companies alleged in the media to be close to insolvency? The FSA is putting in place a regime under which the level of resources allocated (e.g. to the supervision of an authorised insurer) varies according to an assessment of the risk to the FSA's statutory objectives. This is explained in more detail in the FSA publication "Building the New Regulator - progress report I" issued December 2000. As far as Equitas is concerned, the FSA cannot comment or speculate on the affairs of individual companies.

Is any information on such processes publicly available? The FSA would choose appropriate tools from their regulatory toolkit, that best respond to the firm's particular circumstances. For example, restrictions might be imposed on an insurance company close to insolvency to prevent that company from entering into new contract of insurance, or certain types or classes of insurance.

⁸ The basis for the belief is the following July 18, 2001 written indication from a senior FSA official in response to the Author's question: "What returns do Equitas file with [FSA] in addition to the normal annual returns? FSA cannot comment on the affairs of individual companies."

⁹ See *Astor's Equitas Re Handbook*, Ch. 3 ('Recourse').

¹⁰ See the summary at Appendix I.

¹¹ Discussed in detail at *Astor's Equitas Re Handbook*, Ch. 3 ('Recourse').

¹² See especially *SOD*, pp.7, 123-4.

¹³ See for example *Chain of Security 2003*, p.4 ("Lloyd's central assets"): 'The Central Fund is available to back Lloyd's policies issued after 1993. Policies issued before that date have been reinsured by Equitas, an independent FSA-authorised insurance company.' — which is not even consistent with blandishments on the same page, *viz.*, 'The Central Fund is available at the discretion of the Council of Lloyd's to meet any portion of any member's liabilities that they are unable to meet in full.'

(1) operation of law: there appears to be no rule of English law entitling, permitting or inviting an EquitasRe-reinsured SYA participant, or any component of the Lloyd's enterprise — whether or not purporting to be solvent and continuing to do business as usual — to unilaterally impose on any EquitasRe-assured-at-Lloyd's a novation of any insurance contract to any solvent or insolvent reinsurer. Nor has any novation been by mere operation of law effected in the case of any EquitasRe-reinsured insurance contract;

(2) express or implied contractual provisions: though RRCs 4, 5 and 7 all contain provisions applicable to "Insurance Creditors" — though no EquitasRe-assured-at-Lloyd's is party to any such contract, and each is expressly¹⁴ excluded from being a third-party beneficiary of RRC 4 — no R&R contract has, purports or seeks to have the effect of discharging, novating or varying any insurance contract made by any EquitasRe-reinsured SYA participant to the exclusion of the EquitasRe-assured's-at-Lloyd's relevant available recourse to CU funds at the Lloyd's enterprise. RRC 4 (from the benefit of which every EquitasRe-assured-at-Lloyd's is expressly excluded) expressly professes to have no effect on any EquitasRe-reinsured SYA participant's liability for any relevant insurance contract;¹⁵

(3) available-by-express-right CU funds: nothing about R&R appears to derogate from the EquitasRe-assured's-at-Lloyd's existing recourse to available-by-express-right CU funds at the Lloyd's enterprise. No relevant available CU claims payment securitisation fund instrument conditions recourse on Equitas Re's solvency or insolvency. EATD permits¹⁶ the LATD trustee to use EATD funds to pay a LATD liability 100% even though Equitas Re and or Equitas Ltd. is insolvent. Lloyd's US Surplus-Lines Common-Use Trust Deed and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed do not mention Equitas Re;

(4) arguably-available funds at the Lloyd's enterprise: nothing about Equitas Re's insolvency appears to undermine — indeed, that insolvency would appear to strengthen — the EquitasRe-assured's-at-Lloyd's arguments that such funds be made available to pay his claim.

- 3.4** It follows that the EquitasRe-assured's-at-Lloyd's valid claim on a valid EquitasRe-reinsured insurance contract is not reduced or in any way affected by any Proportionate Cover Rate or Proportionate Cover Plan; is not required to prove in Equitas Re's insolvency; is not required to accept any distribution from Equitas Policyholders Trustee; is not by Equitas Re's insolvency in any way prejudiced — indeed in various senses his position may be enhanced — in his recourse to relevant CU funds at the Lloyd's enterprise.

Equitas Re's susceptibility to insolvency

- 3.5** Equitas Re has long averred to US assured-side lawyers, as a tactic in settlement negotiations, that it is impecunious and will shortly become insolvent. It avers equally to external insurance regulators — who confirm — that it is solvent, to the extent that LLD, §12.3.3(4)R presently¹⁷ removes wholly from the enterprise's bal-

¹⁴ See RRC 4, §3.7; and see similarly RRC 5, §2.6.

¹⁵ See for example RRC 4, recital (J) ("... no effect on the liability of any Name or Closed Year Name under any original contract of insurance ..."). Italics added.

¹⁶ See EATD, §4(b).

¹⁷ They will apparently shortly return as contingent liabilities: see (for example) the FSA's proposal at CP 04/7, §2.100.

ance sheet all *Equitas Re*-reinsured liabilities. Speculation continues that *Equitas Re* and or *Equitas Ltd.* will be bought and then schemed under Companies Act 1985, s.425. Presumably the "Lloyd's Director" (see below) on the board of *Equitas Holdings Ltd.* is partly intended to stop *Equitas Re* descending into any sort of insolvency process disruptive to the Lloyd's enterprise, for at that point it will be more widely realised that no *Equitas Re*-reinsured liability has ever left the security of that enterprise, that all legal advice (especially in the US) to the contrary has been erroneous, that NCFB, §§8(3)(b) and 8(4)(b) (already inconsistent with other BO missives on the subject such as *SOD*, pp.7 and 123-4) were promulgated in bad faith, and that the enterprise can continue only if Members sufficiently contribute to a Central Fund sufficient and actually used (to the extent necessary) to pay all insurance liabilities incurred at Lloyd's.

the "Lloyd's Director"

- 3.6 Though *Equitas Re* does not appear to be under the formal control of self-regulators-at-Lloyd's, query the exact role, purpose and susceptibility to control by self-regulators-at-Lloyd's of the "Lloyd's Director" on the board of *Equitas Holdings*. The Deferred Share holder¹⁸ — in practice, self-regulators-at-Lloyd's¹⁹ — is required²⁰ to appoint (and to remove and replace²¹) a so-called "Lloyd's Director"²² to *Equitas Holdings'* board (and thus he sits on the boards of *Equitas Re*²³ and *Equitas Ltd.*²⁴), the privilege and the appointment itself lasting until the Deferred Share's redemption.²⁵ He is treated as any other *Equitas Holdings* director for purposes of retiring from the board.²⁶ The ordinary shareholders have no right to remove him.²⁷ A direct link between each *Equitas* group company and the Lloyd's enterprise, his role has never been fully explained, his board and other activities not disclosed — presumably he is not intended to be wholly ineffectual (whether executive or, *a fortiori*, non-executive²⁸) — the directions he receives from and intel-

¹⁸ This is discussed in detail at *Astor's Equitas Re Handbook*, Ch. 1.

¹⁹ In practice self-regulators-at-Lloyd's: *SOD*, July 30, 1996 cover letter from the Corporation's then CEO, p.iv.

²⁰ *Equitas Holdings* August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §60.1 ("The directors shall not be less than two and not more than sixteen in number, of whom, until such time as the Deferred Share is redeemed, one shall be a Lloyd's Director"). Cf. *ibid.*, §61 ("shall be entitled to appoint ...").

²¹ *Equitas Holdings* August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §62. On relevant procedure, see *ibid.*, §63.

²² See generally *Equitas Holdings* August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §61-64. And see for example *SOD*, p.97: "The Lloyd's deferred share is a mechanism for allowing Lloyd's to have the right to appoint a director to the board of *Equitas Holdings*. The director concerned will also serve on the boards of *Equitas Reinsurance* and *Equitas Limited*."

²³ *Equitas Holdings* August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §76(d).

²⁴ *Equitas Ltd.* September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution), §§51, 52 and 59 read with *ibid.*, §2 definition of "Shareholder".

²⁵ *Equitas Holdings* August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §§60.1, 61, 81(g).

²⁶ See *Equitas Holdings* August 30, 1996 Arts. of Assn. (as amended by April 26, 2001 written members' resolution), §74.

²⁷ *Equitas Holdings* August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §82 ("The Company may ... remove *any* director from office ..."; italics added), but see *ibid.*, "except in the case of the removal ... of the Lloyd's Director" and *ibid.*, §64. The relevant part of *ibid.*, §82 is badly drafted.

ligence he relays to self-regulators-at-Lloyd's not disclosed, and his existence apparently at variance with Equitas Re's claims that the Equitas and Lloyd's enterprises are unconnected.

Equitas Re's actual insolvency

- 3.7 Equitas Re's actual financial insufficiency is anticipated in various contexts in RRCs and other instruments. Repeatedly mentioned in *SOD*,²⁹ it permeates Equitas Re's "Certified Reinsurance Trigger Events"³⁰ and "Automatic Reinsurance Trigger Events",³¹ and Equitas Ltd.'s "Certified Trigger Events"³² and "Automatic Trigger Events";³³ EATD uses the predicate "inadequacy" rather than "insolvency" using Insolvency Act 1986, s.123³⁴ insolvency as one determinant;³⁵ Lloyd's US Surplus-Lines Common-Use Trust Deed and Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed each use the predicate "insolvency" in virtually identical terms;³⁶ and proportionate cover at Equitas Re³⁷ or Equitas Ltd.³⁸ is a response to rather than a means of forestalling insolvency as commonly understood: far from protecting Equitas Re, proportionate cover is capable of hastening the EATD's deemed "inadequacy".³⁹ Insolvency at Equitas Re is likely to have wide-ranging incidents.⁴⁰

²⁸ The Lloyd's Director is described in Equitas Holdings RA fye March 31, 2002, p.22 ("Board of Directors") as "non-executive".

²⁹ See for example *SOD*, p.132: "In the event that Equitas were unable to make payments in full"; "If Equitas were to cease to meet claims ... in full"; "If Equitas were to fail to meet its liabilities in full"; "if Equitas' assets are insufficient to meet these liabilities".

³⁰ See RRC 4, Sch. 3, §2.1.

³¹ See RRC 4, Sch. 3, §2.3.

³² See RRC 5, Sch. 3, §2.1.

³³ See RRC 5, Sch. 3, §2.1.

³⁴ Insolvency Act 1986:-

s.123 — Definition of inability to pay debts — (1) A company is deemed unable to pay its debts (a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or (b) if, in England and Wales, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or ... (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. (2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. (3) The money sum for the time being specified in subsection (1)(a) is subject to increase or reduction by order under section 416 in Part XV.

³⁵ At EATD, §12(a)(2).

³⁶ *Viz.*, the Trustee receives relevant written notice that the "Lloyd's market" has ceased trading (see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(a); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(a)) or (in essence — for full provisions, see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(b); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(b)) after the elapsing of sixty days from a date of a relevant valuation of the trust fund — the "as at" date is not specified — on which the trust assets fell, or after paying a Matured Claim would fall, below the Trust Fund Minimum Amount (see Lloyd's US Surplus-Lines Common-Use Trust Deed, §4.1(b); Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §4.1(b)). *Cf.* LATD, Old Central Fund Byelaw, and New Central Fund Byelaw, which do not use the term

³⁷ See generally RRC 4, Sch. 3.

³⁸ See generally RRC 5, Sch. 3.

³⁹ See EATD, §12(a)(4); see also *ibid.*, §12(a)(2).

⁴⁰ Incidents of Equitas Re undergoing an English insolvency process are capable of including (for example) clarification and resolution of, and the detailed accounting required to establish, outstanding claims against individual EquitasRe-reinsured SYA participants; clarification of Equitas Re's relevance to EquitasRe-assureds-at-Lloyd's in the first place; the EquitasRe-assureds-at-Lloyd's formal recourse to the

Disavowing⁴¹ a policy of not discharging its RRC 4, §3 obligations unadjusted⁴² and in full (while, it is anecdotally said, insistently predicting in settlement discussions its own imminent demise), Equitas Re aspires to settle *ibid.*, §3 claims at 37% and seeks (for example) comprehensive irrevocable policy buy-backs, with Equitas Re and Equitas Ltd. as express third-party beneficiaries. Such conduct appear to be to some extent founded neither on Equitas Holdings' "mission statement" objective to produce a surplus to EquitasRe-reinsured SYA participants, nor on "reducing uncertainty relating to insurance assets and liabilities by the creative use of actuarial and financial techniques",⁴³ but on Equitas Holdings' finance director's apprehension of Equitas Re's insolvency despite those techniques: "The principal risk to the Group remains that it may not be able to settle its liabilities in full";⁴⁴ — *cf.* apparently contrary indications elsewhere in the same RA.⁴⁵ Though Equitas Re will probably not run out of money unexpectedly⁴⁶ or suddenly,⁴⁷ its future appears uncertain,⁴⁸ and to that extent the future — increasingly⁴⁹ in the hands of corporate Members — of the Lloyd's enterprise.

Lloyd's enterprise (if he has not already granted relevant releases); Members' responsibility and liability to furnish CU funds; the Lloyd's enterprise's possible insolvency in default of those funds; the establishing of relevant classes of creditor assured-at-Lloyd's; uniformity of claims settlement technique; uniformity of pay-out; and hence a degree of predictability.

⁴¹ Scott Moser, Equitas Re claims director, American Bar Association meeting, London, 2001.

⁴² See RRC 4, Sch. 3, §3.1 *et seq.*

⁴³ *Reducing uncertainty — reserving issues in the 21st century — Equitas — managing long-tailed risks, May 12, 2000*, Paul Jardine, Commutations Director & Chief Actuary, Equitas Limited, 4th unnumbered slide "Background to Equitas and its financial position".

⁴⁴ Equitas Holdings RA fye March 31, 2002, p.21 (Financial review; June 18, 2002). And see likewise for example Equitas Holdings RA fye March 31, 2001, p.15 (Financial review; July 17, 2001); Equitas Holdings RA fye March 31, 2000, p.15 (Financial review; July 18, 2000). The finance director specifically means EquitasRe-reinsurance liabilities. *Cf.* for example Equitas Re's first filed accounts: as at March 19, 1997, Equitas Re directors apparently did not believe that its assets were not sufficient to meet all its liabilities in full: Equitas Re RA 1996, p.16 (notes to the financial statements for the period ended 4 September 1996) and *ibid.*, p.7. And *cf.* Equitas Holdings RA fye March 31, 2002, p.41 (Notes to the financial statements):-

Going concern — Significant uncertainties exist as to the accuracy of the provision for claims outstanding established by Equitas Limited and recoveries due from reinsurers shown in the balance sheet, further details of which are set out in note 2 on page 43. The ultimate cost of claims and the amounts ultimately recovered from reinsurers could vary materially from the amounts established and could, therefore, have a materially adverse effect on the ability of Equitas Limited to meet the reinsured liabilities in full. If at any time the Directors of Equitas Reinsurance Limited believe that the reinsured liabilities cannot be met in full, they may consider implementing a proportionate cover plan. At the date of this report, the Directors believe that the assets should be sufficient to meet all liabilities in full.

⁴⁵ Equitas Holdings RA fye March 31, 2002, p.41 ("Going concern"):-

Significant uncertainties exist as to the accuracy of the provision for claims outstanding established by Equitas Limited and recoveries due from reinsurers shown in the balance sheet, further details of which are set out in note 2 on page 43. The ultimate cost of claims and the amounts ultimately recovered from reinsurers could vary materially from the amounts established and could, therefore, have a materially adverse effect on the ability of Equitas Limited to meet the reinsured liabilities in full. If at any time the Directors of Equitas Reinsurance Limited believe that the reinsured liabilities cannot be met in full, they may consider implementing a proportionate cover plan. At the date of this report, the Directors believe that the assets should be sufficient to meet all liabilities in full.

⁴⁶ See *S&M*, §50(a) (p.17).

⁴⁷ See *S&M*, §50(b) (p.17).

⁴⁸ See for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5:-

The scope of the market's restructuring was truly ambitious "[G]ood bank/bad bank" solutions are always difficult, involving tough choices, compromises, and difficult-to-predict outcomes; this one is no different. The brief experience of Equitas to-date has been good, but experience with other run-offs, especially those involving the settlement of long-tail liabilities, suggests a cautious outlook.

⁴⁹ Corporate SYA participants consume the most PIL.

EQUITAS RE'S COUNTERPARTIES***Equitas Re's debtors***

- 3.8** Equitas Re's principal debtors include: (1) Equitas Ltd. under RRC 5, §2; (2) EquitasRe-reinsured SYA participants' outward reinsurers⁵⁰ (some of whom are the outwardly-reinsured and or other EquitasRe-reinsured SYA participants): each EquitasRe-reinsured SYA participant has assigned⁵¹ (indirectly⁵²) to Equitas Re his right, title and interest in the proceeds (whether or not accrued) of relevant outward reinsurance. Equitas Re and Equitas Ltd. each bear personally the risk of not collecting that reinsurance;⁵³ (3) the Corporation under various express contractual indemnities relating to Centrewrite and Lioncover.

Equitas Re's creditors**the EquitasRe-reinsured SYA participant**

- 3.9** Each EquitasRe-reinsured SYA participant is Equitas Re's notional creditor to the extent (assuming it can be ascertained) of all his EquitasRe-reinsured liabilities (assuming they can be ascertained). But he has assigned⁵⁴ all his recovery rights against Equitas Re to Equitas Policyholders Trustee and thus receives assigned property, if ever, only in accordance with the assignment: (1) short of a RRC 7, §2.15 Insolvency Event — at which point Equitas Policyholders Trustee is required⁵⁵ to intervene, including to appropriate Equitas Re's relevant assets — he is expressly prohibited⁵⁶ from ordinarily being an actual payee of Equitas Re. He eventually (if ever) is an actual payee⁵⁷ of Equitas Re (for example) after the latter has paid its RRC 4 "General Creditors" in full⁵⁸ and then distributed the balance so far as required to RRC 4 "Insurance Creditors";⁵⁹ (2) when a RRC 7, §2.15 Insolvency Event does occur, he is then entitled to receive from Equitas Policyholders Trustee reimbursement if (an almost impossible event) he has already personally paid an EquitasRe-assured-at-Lloyd's from his own personal assets;⁶⁰ and his due proportion of any surplus,⁶¹ after required prior payments.⁶²

Equitas Policyholders Trustee as surrogate-assignee

- 3.10** When a RRC 7, §2.15 "Insolvency Event" does occur, Equitas Re's principal creditor becomes Equitas Policyholders Trustee⁶³ (wholly owned by Equitas Holdings) as each EquitasRe-reinsured SYA participant's assignee⁶⁴ of relevant RRC 4,

⁵⁰ See for example RRC 4, §§6.1 and 6.4.

⁵¹ See RRC 4, §6.1 *et seq.*

⁵² See RRC 4, §§6.1 and 6.4.

⁵³ See RRC 4, §3.2; RRC 5, §2.3.

⁵⁴ At RRC 4, §4.1 *et seq.*

⁵⁵ See RRC 7, §2.4 etc.

⁵⁶ At RRC 4, §9.4(c). Following a RRC 7, §2.15 Insolvent Event, Equitas Policyholders Trustee pays the EquitasRe-reinsured SYA participant after paying

⁵⁷ See RRC 4, §9.4(c) and the other RRC 4 provisions there mentioned.

⁵⁸ See RRC 4, Sch. 3, §12 read with *ibid.*, §13; see similarly RRC 5, Sch. 3, §12.

⁵⁹ See generally for example RRC 4, §3.4.

⁶⁰ See RRC 7, §2.7(c).

⁶¹ See RRC 7, §2.7(d).

⁶² See generally RRC 7, §2.7(a), (b) and (c).

⁶³ See generally RRC 7.

⁶⁴ See RRC 4, §4.

§3-related rights, Equitas Policyholders Trustee holding those rights — RRC 4, §4 "Assigned Property" (in RRC 7⁶⁵ called "Trust Property") — under RRC 7 on trust for (among others⁶⁶) Insurance Creditors,⁶⁷ viz., the generality of unpaid EquitasRe-assureds-at-Lloyd's.

"General Creditors"

- 3.11** Equitas Re has one type of "General Creditor", of which RRC 4 has one definition⁶⁸ (which expressly excludes every EquitasRe-reinsured participant) and RRC 5 has another⁶⁹ (which does not). Both RRC 4, Sch. 3⁷⁰ and RRC 5, Sch. 3⁷¹ require Equitas Re and Equitas Ltd. to pay their own General Creditors in full before paying (among others) any EquitasRe-reinsured SYA participant. Equitas Policyholders Trustee has similar priorities.⁷² Equitas Re's assets to pay Insurance Creditors are its assets as at the "Record Date"⁷³ less whatever it needs to pay General Creditors.⁷⁴

"Insurance Creditors"

- 3.12** Notwithstanding RRC 4's insistence that the RRC 4, §3 product is mere reinsurance and its express⁷⁵ exclusion of every EquitasRe-assured-at-Lloyd's as a third-party beneficiary of Equitas Re's *ibid.*, §3 reinsurance obligations, RRCs 4,⁷⁶ 5⁷⁷ and 7⁷⁸ provide that every EquitasRe-assured-at-Lloyd's is an "Insurance Creditor" — in relation to Equitas Re, Equitas Ltd. and Equitas Policyholders Trustee respectively (the munificence is, in principle, implicitly without prejudice to his recourse rights against relevant funds at the Lloyd's enterprise in the ordinary way; the EquitasRe-assured-at-Lloyd's is under no contractual or other legal obligation to treat with Equitas Re, Equitas Ltd. or Equitas Policyholders Trustee in any way on any matter):-

(1) Equitas Re generally: Equitas Re has two types of Insurance Creditor, "Actual Insurance Creditor", viz., an Insurance Creditor in respect of whom any Claim is outstanding,⁷⁹ and "Contingent Insurance Creditor", an Insurance Creditor in respect of whom a liability has been incurred but not reported.⁸⁰ RRC 4 envisages Contingent Insurance Creditors being paid in full.⁸¹ An EquitasRe-reinsured SYA participant's liability to an Insurance Creditor is a RRC 4 "Secured Obligation".⁸² Presumably an EquitasRe-assured-at-Lloyd's seeking to prove in Equitas Re's in-

⁶⁵ See RRC 7, §1.1.

⁶⁶ See RRC 7, §2.1 *et seq.*

⁶⁷ See RRC 7, §2.2 *et seq.*

⁶⁸ See at RRC 4, Sch. 2, §1.

⁶⁹ See at RRC 5, Sch. 3, §17.

⁷⁰ RRC 4, Sch. 3, §12.

⁷¹ RRC 5, Sch. 3, §12.

⁷² See RRC 7, §2.7(a).

⁷³ Defined at RRC 4, Sch. 2, §1.

⁷⁴ RRC 4, Sch. 2, §1 definition of "Available Assets".

⁷⁵ RRC 4, §3.7. See similarly RRC 5, §2.6.

⁷⁶ See RRC 4, Sch. 2, §1 definition of "Insurance Creditor".

⁷⁷ See RRC 5, Sch. 1, §1 first sentence.

⁷⁸ See RRC 7, §1.1, definition of "Insurance Creditor".

⁷⁹ RRC 4, Sch. 2, §1 definition of "Actual Insurance Creditor".

⁸⁰ RRC 4, Sch. 2, §1 definition of "Contingent Insurance Creditor".

⁸¹ See RRC 4, Sch. 3, §13.2(c)-(d).

⁸² See RRC 4, Sch. 2, §1 definition of "Secured Obligation".

solvency directly (*cf.* through Equitas Policyholders Trustee⁸³) should take care to avoid any implication of waiver of his claim against an EquitasRe-reinsured SYA participant and thus of his recourse to relevant CU funds at the Lloyd's enterprise;

(2) Proportionate Cover at Equitas Re: if Equitas Re implements a sustainable⁸⁴ RRC 4, Sch. 3 Proportionate Cover Plan, every EquitasRe-assured-at-Lloyd's is similarly an "Insurance Creditor".⁸⁵ On the occurrence of a Certified Reinsurance Trigger Event, Equitas Re's board is entitled to "consult" with him or his "representative" in connection with setting a RRC 4, Sch. 3, §6 Proportionate Cover Rate, suspending payments, or such other matters as Equitas Re's board may determine in its sole discretion;⁸⁶

(3) Equitas Policyholders Trustee: If Equitas Re has sustained a RRC 7, §2.15 Insolvency Event, he is an "Insurance Creditor" in relation to Equitas Policyholders Trustee.⁸⁷ Equitas Policyholders Trustee is empowered⁸⁸ to appropriate to the general fund a claims payment designated by Equitas Re for a particular Insurance Creditor. Equitas Policyholders Trustee also has various functions for the benefit of the relevant Insurance Creditor in relation to a relevant failure by a solvent⁸⁹ Equitas Re: if Equitas Re conducts itself in a solvent fashion, RRC 4 expressly⁹⁰ provides that that the Insurance Creditor is a potential direct payee.

position of EquitasRe-reinsured SYA participants

- 3.13** In RRC 4, the mere EquitasRe-reinsured SYA participant is called a "Reinsured Party".⁹¹ He is neither a RRC 4-defined "Insurance Creditor" nor a RRC 4- or RRC 5⁹²-defined "General Creditor". During an insolvency process of its own, Equitas Re need not concern itself with any EquitasRe-reinsured SYA participant as an active creditor, for each has already assigned⁹³ relevant rights and recoveries to Equitas Policyholders Trustee, which acts as his compulsory proxy in any relevant insolvency process.

EQUITAS POLICYHOLDERS TRUSTEE

role other than in an "Insolvency Event"

- 3.14** Equitas Policyholders Trustee has various functions in relation to a solvent Equitas Re, *viz.*, principally, to seek to cure Equitas Re's failure, "notified by any Reinsured Name or the Substitute Agent",⁹⁴ to discharge its obligation to the relevant EquitasRe-reinsured SYA participant and or Equitas Policyholders Trustee to make any

⁸³ See RRC 7, §2.4 *et seq.*

⁸⁴ See RRC 7, §2.15(c)(i).

⁸⁵ See the detailed RRC 4, Sch. 2, §1 definition of "Insurance Creditor".

⁸⁶ RRC 4, Sch. 3, §2.4.

⁸⁷ See generally RRC 7, §1.1 (definition of "Insurance Creditor") and *ibid.*, §2.7(b).

⁸⁸ See RRC 4, §4.10; RRC 7, §2.4.

⁸⁹ See RRC 7, §2.2.

⁹⁰ See generally RRC 4, §3.4(e).

⁹¹ See RRC 4, Sch. 2, §1 definition of "Reinsured Parties".

⁹² See RRC 5, Sch. 1, §1, a materially different, manifestly erroneous definition. The purpose of the error is not clear.

⁹³ See generally RRC 4, §4.

⁹⁴ RRC 7, §2.2.

payment to an EquitasRe-assured-at-Lloyd's in accordance with the RRC 4, §3.⁹⁵ The EquitasRe-assured-at-Lloyd's is under no contractual or other legal obligation to treat with Equitas Policyholders Trustee in any way on any matter.

role following an "Insolvency Event"

RRC 7, §2.15 "Insolvency Event"

3.15 Any of the following constitutes a RRC 7, §2.15 Insolvency Event, viz.:-

(1) Equitas Re's failure to comply within seven days with a final judgment that it make any RRC 4 payment.⁹⁶

(2) an order is made by any competent court, or a resolution is passed, for Equitas Re's winding-up or for the appointment of a liquidator or provisional liquidator of Equitas Re.⁹⁷ Any of those three circumstances happens also to be a RRC 4, Sch. 3, §2.3 Automatic Reinsurance Trigger Event, on the occurrence of which Equitas Re is required⁹⁸ to adjust its liabilities by applying a Proportionate Cover Rate.⁹⁹ The effect seems to be (the drafting is not clear) that the adjusted liabilities become to some extent¹⁰⁰ binding on Equitas Re's liquidator or provisional liquidator as at the adjustment's effective date¹⁰¹ — and also¹⁰² on Equitas Policyholders Trustee when the latter seeks to prove in the liquidation — and Equitas Re does *not* implement a Proportionate Cover Plan (the definition of which appears to be defective¹⁰³);

(3) Equitas Re is unable or deemed unable to pay its actually or potentially adjusted debts within the meaning of Insolvency Act 1986, s.123,¹⁰⁴ or suspends or threatens to suspend making payments (whether of principal or interest) with respect to all of its debts or debts of any particular class¹⁰⁵ — in determining if Equitas Re is unable to pay its debts, Equitas Policyholders Trustee is required to take into account the extent to which any debt which Equitas Re would otherwise be obliged to pay in full "can" be paid at less than that amount further to RRC 4, Sch. 3, §9¹⁰⁶ or under any actual¹⁰⁷ or potential¹⁰⁸ Proportionate Cover Plan. The provision suggests (the drafting is not clear) that an altogether different process applies at Equitas Re in the event of a Certified (as distinct from an Automatic) Reinsurance Trigger Event, viz., the event occurs;¹⁰⁹ Equitas Re adjusts its liabilities,¹¹⁰ the adjustment takes ef-

⁹⁵ See RRC 4, §2.2; *q.v.* for full provisions.

⁹⁶ RRC 7, §2.15(a).

⁹⁷ RRC 7, §2.15(b).

⁹⁸ See RRC 4, Sch. 3, §3.1.

⁹⁹ See RRC 4, Sch. 2, §1 definition of "Proportionate Cover Rate"; *ibid.*, Sch. 3, §3.1 *et seq.*

¹⁰⁰ The liquidator or provisional liquidator is contractually permitted to recalculate the liabilities: see RRC 4, Sch. 3, §10.1.

¹⁰¹ See RRC 4, Sch. 3, §3.3.

¹⁰² See RRC 4, Sch. 3, §10.1.

¹⁰³ See the RRC 4, Sch. 2, §1 definition.

¹⁰⁴ RRC 7, §2.15(c)(i) (actually adjusted) and (ii) (potentially).

¹⁰⁵ RRC 7, §2.15(c).

¹⁰⁶ RRC 7, §2.15(c)(iii).

¹⁰⁷ RRC 7, §2.15(c)(i).

¹⁰⁸ RRC 7, §2.15(c)(ii).

¹⁰⁹ See RRC 4, Sch. 3, §2.1.

¹¹⁰ See RRC 4, Sch. 3, §3.1.

fect;¹¹¹ Equitas Re then "implements" a Proportionate Cover Plan.¹¹² The plan can be effective in forestalling a RRC 7, §2.15(c) Insolvency Event;

(4) an administrator, administrative receiver or manager, receiver, trustee or similar officer is appointed, or an administration order is made, with respect to Equitas Re or all or a substantial part of its assets.¹¹³

functions summarised

3.16 Equitas Policyholders Trustee is the (secured¹¹⁴) sole assignee¹¹⁵ of each EquitasRe-reinsured SYA participant's relevant rights against Equitas Re in respect only of the latter's RRC 4, §3 functions, not its *ibid.*, §9 functions. As assignee to that extent, Equitas Re having sustained a RRC 7, §2.15 "Insolvency Event" — being part of the Equitas group, Equitas Policyholders Trustee is well placed to anticipate and react immediately — Equitas Policyholders Trustee has three principal functions:¹¹⁶

(1) in relation to a payment of an approved claim which Equitas Re was on the point of making from its personal funds¹¹⁷ to a particular EquitasRe-assured-at-Lloyd's,¹¹⁸ Equitas Policyholders Trustee is empowered¹¹⁹ ¹²⁰ to serve a notice on Equitas Re appropriating that payment to itself.¹²¹ The putative payee claimant loses the payment as such;¹²²

(2) to¹²³ take whatever steps it deems necessary to marshall¹²⁴ and protect¹²⁵ other RRC 7, §1.1 Trust Property,¹²⁶ including to petition to wind up Equitas Re.¹²⁷ Equitas Policyholders Trustee would also exercise, in the appropriate manner, its rights under RRC 4, §4.1(a).¹²⁸ In trying to extract assets from Equitas Re in the course of an insolvency process, Equitas Policyholders Trustee is required to establish the amount owing by Equitas Re under the terms of the Reinsurance Contract and the relevant amount due to each Insurance Creditor.¹²⁹ Equitas Policyholders Trustee is entitled to assume, absent other satisfactory evidence from an In-

¹¹¹ See RRC 4, Sch. 3, §3.2.

¹¹² See RRC 4, Sch. 3, §5.1.

¹¹³ RRC 7, 2.15(d).

¹¹⁴ RRC 4, §4.3; and see Equitas Re's acknowledgment at *ibid.*, §4.5. The security is a continuing one: *ibid.*, §4.9.

¹¹⁵ See RRC 4, §4.3.

¹¹⁶ *Viz.*, solely (RRC 7, §2.12) per RRC 7, §§2.4 to 2.11 *et seq.*

¹¹⁷ RRC 4, §4.10 read with *ibid.*, §§3.4 and 4.2.

¹¹⁸ RRC 7, §2.4.

¹¹⁹ See RRC 4, §4.10; and see *ibid.*, §3.4; RRC 7, §2.4.

¹²⁰ See RRC 4, §4.10.

¹²¹ RRC 7, §2.4.

¹²² RRC 7, §2.5. He loses it altogether to the extent Equitas Policyholders Trustee makes no *ibid.*, §2.7(b) payment to him.

¹²³ See RRC 7, §2.4.

¹²⁴ See RRC 7, §2.4.

¹²⁵ See RRC 7, §2.4.

¹²⁶ *Viz.*, as defined in RRC 7, §1.1; identical to the "Assigned Property" defined in RRC 4, §4.1.

¹²⁷ RRC 7, §2.4.

¹²⁸ In doing so Equitas Policyholders Trustee would be in a position equivalent to that of SYA participants in *New Cap Reinsurance Corporation Ltd. v HIH Casualty & General Insurance Ltd.* (CA, February 20, 2002; unreported), §14 (Jonathan Parker LJ).

¹²⁹ RRC 7, §2.6.

insurance Creditor personally, the accuracy of figures provided by a liquidator, administrator, supervisor or further to a Companies Act 1985, s.425 scheme of arrangement enabling Equitas Policyholders Trustee to calculate that amount.¹³⁰ Notwithstanding its functions and powers in relation to extracting Trust Property from Equitas Re, Equitas Policyholders Trustee is required¹³¹ not to seek to prevent RRC 4, §8 return premium unless of the opinion that Equitas Re would thereafter be unable or deemed unable to pay its debts within the meaning of Insolvency Act 1986, s.123 and on the assumption that Equitas Re has no power to introduce a Proportionate Cover Plan;

(3) to distribute, in accordance with RRC 7, §2.7, such of Equitas Re's money as it has been able to marshal.

distribution of RRC 7 "Trust Property"

3.17 Equitas Policyholders Trustee is required¹³² to distribute whatever RRC 7, §1.1 Trust Property it happens to have been able to extract from Equitas Re — subject to being fully indemnified¹³³ and net¹³⁴ of all relevant expenses. Equitas Policyholders Trustee — in the following order of priority:-

(1) first, to pay itself its own due remuneration and any other RRC 7 costs, charges, liabilities and expenses;¹³⁵

(2) secondly, to pay Secured Obligations owing, actually, prospectively or contingently, to each Insurance Creditor or his assignee proportionately, as determined by Equitas Policyholders Trustee itself.¹³⁶ The EquitasRe-assured-at-Lloyd's is expressly not a third-party beneficiary of RRC 4¹³⁷ or RRC 5;¹³⁸ but RRC 7, §2.7(b) is to the opposite effect. Though the EquitasRe-assured-at-Lloyd's appears to have no obligation to become involved in Equitas Re's insolvency — whether directly or through Equitas Policyholders Trustee — there appears to be no reason in principle why he should not accept a partial payment from Equitas Policyholders Trustee without prejudice to his right to recourse for the full amount to relevant CU funds at the Lloyd's enterprise. Equitas Policyholders Trustee is entitled to assume that the Insurance Creditor has not already been paid direct by any EquitasRe-reinsured SYA participant.¹³⁹ The payout, which is subject to Equitas Policyholders Trustee receiving (if it so wishes) the putative recipient Insurance Creditor's written confirmation that he will apply such sums to reduce or extinguish amounts owed to

¹³⁰ RRC 7, §2.6.

¹³¹ RRC 7, §2.17.

¹³² See RRC 7, §2.5 *et seq.*

¹³³ See RRC 7, §2.14; and see generally *ibid.*, §7.3.

¹³⁴ See RRC 7, §2.7(a).

¹³⁵ RRC 7, §2.7(a). A separate point: Equitas Policyholders Trustee's own creditors are RRC 5, Sch. 1, §1-defined "General Creditors" whom Equitas Ltd. is required to pay in full: *ibid.*, Sch. 3, §12.

¹³⁶ RRC 7, §2.7(b) and see *ibid.*, §2.16. "Any determination of the persons entitled to any sums received by the Trustee in respect of the Trust Property shall be conclusive": *ibid.*, §2.16. "Pending such determination, the Trustee shall be entitled to invest such sums in Authorised Investments and to accumulate any income arising thereon": *ibid.*

¹³⁷ See RRC 4, §3.7.

¹³⁸ See RRC 5, §2.6.

¹³⁹ RRC 7, §2.9.

him under "the" EquitasRe-reinsured insurance,¹⁴⁰ is particularly downsized if Equitas Re is already implementing a Proportionate Cover Plan;¹⁴¹

(3) thirdly, to reimburse any EquitasRe-reinsured SYA participant who had made any payment to an Insurance Creditor before Equitas Policyholders Trustee did so (including any payment made by way of set-off), fully if funds permit, otherwise proportionately.¹⁴² It is for the EquitasRe-reinsured SYA participant to provide evidence to Equitas Policyholders Trustee that he has made such a payment;¹⁴³

(4) fourthly, to distribute any remnants proportionately to each EquitasRe-reinsured SYA participant according to the value of the Trust Property *originally* assigned to Equitas Re under RRC 4, §4.1.¹⁴⁴

If Equitas Policyholders Trustee receives any sum in the nature of Trust Property and is unable to determine how it should be distributed under RRC 7 or is "aware" of any dispute or proceeding by any person in respect of his entitlement under RRC 7 or in respect of Equitas Policyholders Trustee's determination of such entitlement, it is empowered¹⁴⁵ to withhold distribution until satisfied how it should be distributed.

Equitas Policyholders Trustee protected

- 3.18** If Equitas Policyholders Trustee complies with its RRC 7, §2.7 *et seq.* distribution obligations, no Insurance Creditor, EquitasRe-reinsured SYA participant or AUA 9 is entitled to make any claim against it in relation to the distribution.¹⁴⁶ In particular, absent Equitas Policyholders Trustee's wilful default in making such determination, no Insurance Creditor, EquitasRe-reinsured SYA participant or AUA 9 is entitled to make any claim against Equitas Policyholders Trustee in relation to a distribution under RRC 7, §2.16.¹⁴⁷ Equitas Policyholders Trustee additionally benefits from express indemnities.¹⁴⁸

effect of proportionate cover at Equitas Re on RRC 7, §2.15 "Insolvency"

- 3.19** The notion that Equitas Re cannot become insolvent because it is contractually empowered to artificially reduce its original liabilities to zero, however pernicious, does have contractual importance. For example, a feasible¹⁴⁹ proportionate cover plan has the effect of enabling Equitas Re to escape for RRC 7, §2.15 purposes one definition of "Insolvency Event", *viz.*, an Insolvency Act 1986, s.123 inability to pay its *unadjusted* debts.¹⁵⁰ If Equitas Re decides to implement a feasible proportionate cover plan and in the (presumably unlikely) event that no other RRC 7,

¹⁴⁰ RRC 7, §2.11.

¹⁴¹ See RRC 7, §2.10.

¹⁴² RRC 7, §2.7(c).

¹⁴³ RRC 7, §2.9. Such payment is highly improbable because of Equitas Re's RRC 4, §9 exclusive run-off agency.

¹⁴⁴ RRC 7, §2.7(d).

¹⁴⁵ RRC 7, §2.16; *q.v.* for full provisions.

¹⁴⁶ RRC 7, §2.8.

¹⁴⁷ RRC 7, §2.16.

¹⁴⁸ See RRC 7, §§2.7(a), 2.14, and (generally) 7.3.

¹⁴⁹ See arguably RRC 7, 2.15(c) ("can be paid").

¹⁵⁰ See RRC 7, §2.15(c)(i) and (ii).

§2.15 Insolvency Event occurs, Equitas Policyholders Trustee's *ibid.*, §2.4 marshalling and protection obligations do not arise, and Equitas Re appears to be able (all other things being equal) to pay out without hindrance.

Equitas Policyholders Trustee's role

- 3.20** If Equitas Re does implement a proportionate cover plan before a RRC 7, §2.15 "Insolvency Event", the Trust Property that Equitas Policyholders Trustee is entitled to marshal and protect under *ibid.*, §2.4, and that it is required to distribute under *ibid.*, §2.7, appears to be whatever relevant adjusted amount emerges from such plan.¹⁵¹ The degree to which such recalibration is binding in a conventional insolvency process to which Equitas Re may subsequently be subject is not clearly expressed in RRC 4.¹⁵²

¹⁵¹ See RRC 7, §2.10.

¹⁵² The interaction between RRC 4, Sch. 3, §§3 and 5 is particularly unclear; *ditto* RRC 5, Sch. 3, §§3 and 5.

Sub-chapter 2: some insolvency processes and precipitates

ADMINISTRATION

3.21 RRC 7, §2.15 Insolvency Events include¹⁵³ the making of an administration order¹⁵⁴ in relation to *Equitas Re*. The procedure is now¹⁵⁵ expressly¹⁵⁶ available to an 'insurer' as defined. Administration is intended to rescue a company,¹⁵⁷ achieve a better result for its creditors than would liquidation without previous administration,¹⁵⁸ or, in specified circumstances¹⁵⁹ — absent which the administrator must act in the interests of the 'company's creditors as a whole'¹⁶⁰ — realise 'property' to distribute to secured or preferential creditors.¹⁶¹ The administrator, who is an officer of the court whether or not court-appointed,¹⁶² must perform his functions 'as quickly and efficiently as ... reasonably practicable'.¹⁶³ Once the court has made an administration order, it must dismiss a petition to liquidate the company¹⁶⁴ absent certain circumstances.¹⁶⁵ The company enjoys relief in relation to certain other matters.¹⁶⁶

¹⁵³ See RRC 7, §2.15(d).

¹⁵⁴ See Insolvency Act 1986, Sch. B1, §10 *et seq.* (*cf.* precipitation into administration by a holder of a floating charge (*ibid.*, §§14-21), and by the company or its directors (*ibid.*, §§22-34). On administration generally in relation to an 'insurer', see Insolvency Act 1986, s.8 and *ibid.*, Sch. B1, read with Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242) and Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634). A general discussion of administration is outside this work's scope.

¹⁵⁵ See formerly Insolvency Act 1986, s.8(4)(a) (repealed and replaced by Enterprise Act 2002, s.248(1)), and Insolvency Act 1986, Sch. B1, §9(2)-(3) (now varied by Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242), §3).

¹⁵⁶ See FSMA 2000, s.360; Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242), §3; Financial Services and Markets Act 2000 (Insolvency) (Definition of "Insurer") Order 2001 (SI 2001/2634).

¹⁵⁷ Insolvency Act 1986, Sch. B1, §3(1)(a). The administrator must perform his functions with that objective unless he thinks either that it is 'not reasonably practicable' or that pursuing the *ibid.*, §3(1)(b) objective would achieve a 'better result for the company's creditors as a whole': *ibid.*, §3(3)(a)-(b).

¹⁵⁸ Insolvency Act 1986, Sch. B1, §3(1)(b).

¹⁵⁹ See Insolvency Act 1986, Sch. B1, §3(4)(a) (administrator thinks it is not reasonably practicable to rescue the company or achieve a better result for its creditors, under *ibid.*, §3(1)(a)-(b) respectively) and *ibid.*, (b) (he does not 'unnecessarily' harm the interests of the 'company as a whole' — on which see the general rule at *ibid.*, §3(2)).

¹⁶⁰ Insolvency Act 1986, Sch. B1, §3(2).

¹⁶¹ Insolvency Act 1986, Sch. B1, §3(1)(c).

¹⁶² Insolvency Act 1986, Sch. B1, §5.

¹⁶³ Insolvency Act 1986, Sch. B1, §4.

¹⁶⁴ Insolvency Act 1986, Sch. B1, §42(3).

¹⁶⁵ *Viz.*, a petition to wind up is made under Insolvency Act 1986, s.124A or under FSMA 2000, s.367: Insolvency Act 1986, Sch. B1, §42(4).

¹⁶⁶ See for example Insolvency Act 1986, Sch. B1, §42(1) (no resolution may be passed for its winding up); *ibid.*, §43(2) (no enforcement of security); *ibid.*, §43(3) (no steps to repossess hire-purchase goods); and see generally *ibid.*, §§43-44 etc.

CVA***orientation***

- 3.22** An Insolvency Act 1986, Part I CVA¹⁶⁷ — which has extensive moratorium provisions¹⁶⁸ — is generally inappropriate to the extent that the insolvent insurance company's every policyholder cannot readily be identified, likely to be the case at Equitas Re. RRC 4, §4.1 "Assigned Property" includes each EquitasRe-reinsured SYA participant's rights against Equitas Re pursuant to a CVA.¹⁶⁹

some RRC provisions***proposing a CVA***

- 3.23** If Equitas Ltd.'s board considers that they are unable, for whatever reason, to make any determination required for the purposes of RRC 5, Sch. 3, §§5 and 6, Equitas Ltd. then becomes entitled to take action with a view to promoting a CVA.¹⁷⁰ If Equitas Ltd. notifies it that Equitas Ltd. is to take any action with a view to promoting a CVA, Equitas Re may take such action.¹⁷¹

payouts

- 3.24** Equitas Re's right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of CVA expenses.¹⁷² Equitas Policyholders Trustee is empowered to receive RRC 7, §1.1 Trust Property pursuant to a CVA made between Equitas Re and its creditors, must distribute that property to Insurance Creditors in accordance with RRC 7, §2.7,¹⁷³ and is in doing so entitled to assume the accuracy of calculations produced in the course of that arrangement in relation to an EquitasRe-reinsured SYA participant's relevant liability to an EquitasRe-assured-at-Lloyd's.¹⁷⁴ The EquitasRe-reinsurance Trustees are empowered¹⁷⁵ to consent to any CVA made in relation to Equitas Re as they in their absolute discretion think fit.

PROVISIONAL LIQUIDATION

- 3.25** Provisional liquidation¹⁷⁶ is expressly alluded to in various RRCs¹⁷⁷ and elsewhere.¹⁷⁸ In relation to Equitas Re, a RRC 4, Sch. 3 Automatic Reinsurance Trigger

¹⁶⁷ See generally Insolvency Act 1986, Part I. A general discussion of the CVA is outside this work's scope.

¹⁶⁸ See Insolvency Act 1986, s.1A and Sch. A1.

¹⁶⁹ RRC 4, §4.1(a)(ii); and see RRC 7, recital (B)(a)(ii).

¹⁷⁰ RRC 5, Sch. 3, §8.1(a)

¹⁷¹ RRC 4, Sch. 3, §8.1(a).

¹⁷² RRC 5, Sch. 3, §12.

¹⁷³ RRC 7, §2.5.

¹⁷⁴ RRC 7, §2.6.

¹⁷⁵ RRC 17, §8.1(m).

¹⁷⁶ See generally Insolvency Act 1986, s.135:-

(1) Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally. (2) In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed. ... (4) The provisional liquidator shall carry out such functions as the court may confer on him. (5) When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him.

Recent examples of UK insurance companies in provisional liquidation include BAI (Run-Off) Ltd.; Black Sea & Baltic General Insurance Co. Ltd.; Independent Insurance Co. Ltd.; Municipal General Insurance Co. Ltd.; North Atlantic Insurance Co. Ltd.; Pan Atlantic Insurance Co. Ltd.; UIC Insurance Co. Ltd.; United Standard Insurance Co. Ltd.

Event includes (among other scenarios) the appointment of a provisional liquidator of Equitas Re,¹⁷⁹ and the date of his appointment determines the date on which an Automatic Reinsurance Trigger Event-precipitated adjustment takes effect.¹⁸⁰ If Equitas Ltd. puts it on notice that it intends to apply to a court for the appointment of a provisional liquidator, Equitas Re becomes entitled to take the same action.¹⁸¹ In relation to Equitas Ltd., a RRC 5, Sch. 3 Automatic Trigger Event includes (among other scenarios) the appointment of a provisional liquidator of Equitas Ltd.;¹⁸² the date of his appointment determines the date on which an Automatic Trigger Event-precipitated adjustment takes effect.¹⁸³ If Equitas Ltd.'s board consider that they are unable, for whatever reason, to make a determination required for RRC 5, Sch. 3, §§5 and 6, Equitas Ltd. becomes entitled to apply to the court for the appointment of a provisional liquidator.¹⁸⁴ In relation to Equitas Policyholders Trustee, a RRC 7, §1.1 Insolvency Event includes (among other scenarios) the appointing of a provisional liquidator of Equitas Re.¹⁸⁵ 0

RECEIVERSHIP

- 3.26** A RRC 7, §2.15 Insolvency Event occurs when (among other scenarios) a receiver is appointed made with respect to Equitas Re or the whole or any substantial part of its assets.¹⁸⁶

SCHEME OF ARRANGEMENT

orientation

- 3.27** A Companies Act 1985, s.425 scheme of arrangement¹⁸⁷ has been a fashionable¹⁸⁸ vehicle for running off, and (in the case of a cut-off scheme of arrangement) bringing to a relatively prompt conclusion, the liabilities of an insolvent English insur-

¹⁷⁷ See for example in the context of Equitas Re's insolvency, RRC 4, Sch., 3, §§10.1 heading, 10.1, 10-2, 12; in the context of Equitas Ltd.'s insolvency, RRC 5, Sch., 3, §§10.1 heading, 10.1, 10.2, 12; RRC 7, §§2.6, 2.7(b), 2.7(d), 2.10, 2.15(b).

¹⁷⁸ See for example EATD, §§12(1), 15; Equitas standard-form settlement agreement, §7.

¹⁷⁹ RRC 4, Sch. 3, §2.3(c).

¹⁸⁰ RRC 4, Sch. 3, §3(iii).

¹⁸¹ RRC 4, Sch. 3, §8.1.

¹⁸² RRC 5, Sch. 3, §2.3(c).

¹⁸³ RRC 5, Sch. 3, §3(iii).

¹⁸⁴ RRC 5, Sch. 3, §8.1.

¹⁸⁵ RRC 7, §2.15(b).

¹⁸⁶ RRC 7, §2.15(d).

¹⁸⁷ See recently for example *Re Equitable Life Assurance Society* (Lloyd J; November 26, 2001; unreported); *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA); *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182 (Neuberger J); *Re Axa Equity & Law Life Assurance Society plc and Axa Sun Life plc* [2001] 1 All ER (Comm) 1010 (Evans-Lombe J).

¹⁸⁸ Recent examples of UK insurance companies which have adopted s.425 schemes include Andrew Weir Insurance Company Ltd.; Anglo American Insurance Company Ltd.; Bermuda Fire & Marine Insurance Company Ltd.; Bristol Re Insurance Company Ltd.; Bryanston Insurance Company Ltd.; Chancellor Insurance Company Ltd.; Charter Re Insurance Company Ltd.; Chester Street Insurance Services Ltd.; English & American Insurance Company Ltd.; Fremont Insurance Company (UK) Ltd.; Hawk Insurance Company Ltd.; ICS Reinsurance Pte Ltd.; ICS (UK) Ltd.; the KWELM companies (Kingscroft Insurance Company Ltd.; Walbrook Insurance Company Ltd.; El Paso Insurance Company Ltd.; Lime Street Insurance Company Ltd.; Mutual Reinsurance Company Ltd.); London & Overseas Insurance Company Ltd.; Monument Marine and General Insurance Company Ltd.; OIC Run-off Ltd.; Pine Top Insurance Company Ltd.; RMCA Reinsurance Ltd.; Scan Re Insurance Company Ltd.; Sovereign Marine and General Insurance Company Ltd.; Stockholm Re (Bermuda) Ltd.; Trinity Insurance Company Ltd.

ance company,¹⁸⁹ whether not yet subject to an formal insolvency procedure, already in liquidation,¹⁹⁰ or subject to an administration order.¹⁹¹ Three varieties have evolved: the run-off scheme, of uncertain duration and outcome; the estimation and valuation ("cut-off") scheme¹⁹² — intended to be of shorter duration and definitive outcome; and the hybrid scheme, *viz.*, a run-off scheme which in due course becomes a cut-off scheme. The court has power to sanction a compromise or arrangement arrived at between a company and at least three-quarters in value of its creditors either overall or of a particular class.¹⁹³ That approved arrangement is then binding on the company and the relevant creditors;¹⁹⁴ US courts may issue related injunctions.¹⁹⁵ If the company is already in liquidation, the arrangement is binding on the liquidator.¹⁹⁶ The court order takes effect when an office copy has been delivered to the Registrar of Companies.¹⁹⁷

some R&R provisions

proposing a scheme

- 3.28 A scheme of arrangement is mentioned in RRCs.¹⁹⁸ Most fundamentally, RRC 4, §4.1 "Assigned Property" includes each *EquitasRe*-reinsured SYA participant's rights against *Equitas Re* pursuant to such a scheme.¹⁹⁹ If members of *Equitas Ltd.*'s board consider that they are unable, for whatever reason, to make a determination required for the purposes of RRC 5, Sch. 3, §§5 and 6, *Equitas Ltd.* then becomes entitled to take action with a view to promoting a s.425 scheme.²⁰⁰ If *Equitas Ltd.* notifies it that *Equitas Ltd.* is to take any action with a view to promoting a s.425

¹⁸⁹ The KWELM scheme of arrangement is an example of the genre: For a summary, see for example KWELM 7th Annual Report to Creditors for the year ended 31 December 2000. It pays out in US dollars (KWELM 7th Annual Report to Creditors for the year ended 31 December 2000, p.1) an average of 30% (*ibid.*, p.3) on mostly US casualty, professional indemnity and other liability products (*ibid.*, p.15) to assureds mostly resident in the US (*ibid.*, p.1).

¹⁹⁰ Companies Act 1985, s.425(1).

¹⁹¹ Companies Act 1985, s.425(1).

¹⁹² See recently for example *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA). Historically see *S&M*, §50(d) (p.18):-

Names would be likely to vote in favour of a scheme of arrangement if policyholders were to agree to release Names from the remaining percentage of their liabilities not covered by assets remaining within *Equitas*. The ultimate policyholders may be willing to release their residual claims against names, if that were the price for receiving an immediate payment from *Equitas*.

¹⁹³ Companies Act 1985, s.425(2). As to classes of creditor, see recently for example *Re Equitable Life Assurance Society* (Lloyd J; November 26, 2001; unreported); *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 (CA); *Re Osiris Insurance Ltd.* [1999] 1 BCLC 182 (Neuberger J; and see *ibid.* at 190-191 on sophisticated and unsophisticated, large and small assureds).

¹⁹⁴ Companies Act 1985, s.425(2).

¹⁹⁵ See for example the KWELM administrators' 7th Annual Report to Creditors (2000), p.13:-

The vast majority of claims should be agreed without recourse to arbitration or litigation. The Arrangement does, however, contain provisions delaying the commencement or continuation of proceedings (to establish the existence or amount of a claim) against the KWELM companies other than in specified circumstances. This is supported by a permanent Injunction Order under Section 304 of the US Bankruptcy Code which enjoins and restrains policyholders and creditors from proceeding against the KWELM companies or their property in the United States, except as permitted by the Arrangement. These provisions exist to avoid the KWELM companies being unnecessarily involved in expensive, protracted and complex litigation.

¹⁹⁶ Companies Act 1985, s.425(2).

¹⁹⁷ Companies Act 1985, s.425(3).

¹⁹⁸ See for example RRC 4, §4.1(a)(ii); RRC 4, Sch. 3, §8.1(a); RRC 5, Sch. 3, §8.1(a); RRC 7, §2.5.

¹⁹⁹ RRC 4, §4.1(a)(ii); and see RRC 7, recital (B)(a)(ii).

²⁰⁰ RRC 5, Sch. 3, §8.1(a)

scheme, Equitas Re may take such action.²⁰¹ If Equitas Ltd. proposes a s.425 scheme after a RRC 5, Sch. 3, §2.1 Certified Trigger Event has occurred, Equitas Ltd.'s liability to Equitas Re under RRC 5, §2 must be quantified according to RRC 5, Sch. 3 unless and until varied by the terms of an approved s.425 scheme.²⁰² Similarly, if Equitas Re proposes a s.425 scheme after the occurrence of a RRC 4, Sch. 3, §2.1 Certified Reinsurance Trigger Event, its RRC 4, §3 liability to EquitasRe-reinsured SYA participants must be quantified according to RRC 4, Sch. 3 unless and until varied by the terms of an approved s.425 scheme.²⁰³

payment out

- 3.29** Equitas Re's right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of an Equitas Ltd. section 425 scheme.²⁰⁴ Similarly, each EquitasRe-reinsured SYA participant in relation to expenses of an Equitas Re section 425 scheme.²⁰⁵ Equitas Policyholders Trustee is empowered to receive RRC 7, §1.1 Trust Property pursuant to a s.425 scheme made between Equitas Re and its creditors, must distribute that property to Insurance Creditors in accordance with RRC 7, §2.7,²⁰⁶ and is entitled to assume the accuracy of calculations produced in the course of that scheme in relation to an EquitasRe-reinsured SYA participant's relevant liability to an EquitasRe-assured-at-Lloyd's.²⁰⁷ The EquitasRe-reinsurance Trustees, for their part, are empowered²⁰⁸ to consent to any scheme of arrangement in relation to Equitas Holdings or any of its subsidiaries as they in their absolute discretion think fit.

WINDING UP

orientation

- 3.30** One of the few provisions in Insurers Winding Up Rules²⁰⁹ relevant to Equitas Re and Equitas Ltd. is *ibid.*, Rule 6 and *ibid.*, Sch. 1, §1 (Rules for valuing general business policies).²¹⁰ Various RRCs and elsewhere²¹¹ (including their respective

²⁰¹ RRC 4, Sch. 3, §8.1(a).

²⁰² RRC 5, Sch. 3, §11.

²⁰³ RRC 4, Sch. 3, §11.

²⁰⁴ RRC 5, Sch. 3, §12.

²⁰⁵ RRC 4, Sch. 3, §12.

²⁰⁶ RRC 7, §2.5.

²⁰⁷ RRC 7, §2.6.

²⁰⁸ RRC 17, §8.1(m).

²⁰⁹ The instrument applies largely to insurers liable under "contracts of long term insurance" (which excludes Equitas Re and Equitas Ltd., even though their insurance liabilities are likely to exceed in time most long-term contracts): see Insurers Winding Up Rules, *passim*. A contract of long-term insurance is, broadly, a contract of insurance of or relating to life, annuity, marriage, birth, linked long term, permanent health, tontines, capital redemption, pension fund management, collective insurance and social insurance: *ibid.*, §2(1) read with Regulated Activities Order, §3(1) and *ibid.*, Sch. 1, Part II. So-called "contracts of general insurance" (essentially every other type of insurance, however longevitous) are defined at *ibid.*, Part I (see especially *ibid.*, §13 (general liability)).

²¹⁰ Insurers Winding Up Rules, §6 (Valuation of general business policies):-

Except in relation to amounts which have fallen due for payment before the liquidation date and liabilities referred to in paragraph 2(1)(b) of Schedule 1, the holder of a general business policy shall be admitted as a creditor in relation to his policy without proof for an amount equal to the value of the policy and for this purpose the value of a policy shall be determined in accordance with Schedule 1.

Ibid., Sch. 1, §1 ("Rules for valuing general business policies):-

1. This paragraph applies in relation to periodic payments under a general business policy which fall due for payment after the liquidation date where the event giving rise to the liability to make the payments oc-

Articles of Association²¹²) deal expressly with Equitas Re's²¹³ and Equitas Ltd.'s²¹⁴ liquidation²¹⁵ (*cf.* provisional liquidation). For example, in relation to Equitas Policyholders Trustee, a RRC 7, §1.1 Insolvency Event includes (among other scenarios) the appointing of a liquidator of Equitas Re.²¹⁶

some particular RRC provisions

proving; payouts by Equitas Policyholders Trustee

- 3.31 The amount for which Equitas Policyholders Trustee may prove in Equitas Re's liquidation is limited by reference to calculations made in accordance with RRC 4, Sch. 3, §6 read with *ibid.*, §10.1.²¹⁷ In proving in Equitas Re's liquidation, Equitas Policyholders Trustee must²¹⁸ seek to establish from the information available to it Equitas Re's RRC 4, §3 debts to each Insurance Creditor. Absent sufficient satisfactory evidence from each Insurance Creditor, Equitas Policyholders Trustee is²¹⁹

curring before the liquidation date. (2) The value to be attributed to such periodic payments shall be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct.

2. (1) This paragraph applies in relation to liabilities under a general business policy which arise from events which occurred before the liquidation date but which have not (a) fallen due for payment before the liquidation date; or (b) been notified to the company before the liquidation date. (2) The value to be attributed to such liabilities shall be determined on such actuarial principles and assumptions in regard to all relevant factors as the court shall direct.

3.(1) This paragraph applies in relation to liabilities under a general business policy not dealt with by paragraphs 1 or 2. (2) The value to be attributed to those liabilities shall — (a) if the terms of the policy provide for a repayment of premium upon the early termination of the policy or the policy is expressed to run from one definite date to another or the policy may be terminated by any of the parties with effect from a definite date, be the greater of the following two amounts: (i) the amount (if any) which under the terms of the policy would have been repayable on early termination of the policy had the policy terminated on the liquidation date, and (ii) where the policy is expressed to run from one definite date to another or may be terminated by any of the parties with effect from a definite date, such proportion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which that premium was paid; and (b) in any other case, be a just estimate of that value.

²¹¹ See for example EATD, §§12(1), 15.

²¹² See for example Equitas Re September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution):-

100. If the Company is wound up, the liquidator may, with the sanction of an extraordinary resolution of the Company and any other sanction required by the Insolvency Act 1986, divide among the members in specie the whole or any part of the assets of the Company and may, for that purpose, value any assets and determine how the division shall be carried out as between the members or different classes of members. The liquidator may, with the like sanction, vest the whole or any part of the assets in trustees upon such trusts for the benefit of the members as he with the like sanction determines, but no member shall be compelled to accept any assets upon which there is a liability. 101. The power of sale of a liquidator shall include a power to sell wholly or partially for shares or debentures or other obligations of another body corporate, either then already constituted or about to be constituted for the purpose of carrying out the sale.

And see substantially identical Equitas Ltd. September 2, 1996 Articles of Association (as amended by May 1, 2001 sole member's written resolution, §§100-101; Equitas Holdings August 30, 1996 Articles of Association (as amended by April 26, 2001 written members' resolution), §§125-126.

²¹³ See for example RRC 4, Sch., 3, §§10.1 heading, 10.1, 10.2, 12.

²¹⁴ See for example RRC 5, Sch., 3, §§10.1 heading, 10.1, 10.2, 12; RRC 7, §§2.6, 2.7(b), 2.7(d), 2.10, 2.15(b).

²¹⁵ See for example in the context of Equitas Re's insolvency, RRC 4, Sch. 3, §§2.3(c), 3.3(iii), 8.1; in the context of Equitas Ltd.'s insolvency, RRC 5, Sch. 3, §§2.3(c), 3.3(iii), 8.1; RRC 7, §2.15(b). Liquidation is a corporate death process rarely undergone by insolvent insurance companies because it is usually too expensive in relation to the company's few surviving assets. Recent examples include Aneco Reinsurance Underwriting Ltd.; Continental Assurance Co. of London Plc; Electric Mutual Liability Insurance Co. Ltd.; London United Investments; National Employers Mutual General Insurance Association.

²¹⁶ RRC 7, §2.15(b).

²¹⁷ RRC 4, Sch. 3, §10.1.

²¹⁸ RRC 7, §2.6.

²¹⁹ RRC 7, §2.6.

entitled to assume the accuracy of such of Equitas Re's liquidator's figures as enable Equitas Policyholders Trustee to calculate that debt. Equitas Policyholders Trustee is then required²²⁰ to distribute Equitas Re's money to (among other things²²¹) satisfy Secured Obligations owing to each Insurance Creditor as determined by Equitas Policyholders Trustee in establishing a proof or claim in Equitas Re's liquidation,²²² and then to each EquitasRe-reinsured SYA participant proportionately to the value of the Trust Property assigned by him, that value to be determined by reference to the amount that Equitas Policyholders Trustee proved in Equitas Re's liquidation.²²³ Equitas Policyholders Trustee is entitled²²⁴ to assume Equitas Re's liquidator's figures' accuracy when adjusting pay-outs to Insurance Creditors under RRC 7, §2.7(b).

other

- 3.32** Each EquitasRe-reinsured SYA participant's right to receive any payment from Equitas Re under RRC 4, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of the liquidation.²²⁵ Concerning Equitas Ltd., its liquidator is permitted to "recalculate" Equitas Ltd.'s RRC 5, §2 liability to Equitas Re,²²⁶ and Equitas Re's liquidator is permitted to "recalculate" Equitas Re's RRC 4, §3 liability to any EquitasRe-reinsured SYA participant.²²⁷ Concerning Equitas Ltd., the amount for which Equitas Re may prove in Equitas Ltd.'s liquidation is limited by reference to calculations made in accordance with RRC 5, Sch. 3, §6 read with *ibid.*, §10.1.²²⁸ Equitas Re's right to receive any payment from Equitas Ltd. under RRC 5, Sch. 3 is subordinated to (among other things) paying or providing for the paying in full of the expenses of the liquidation.²²⁹

Sub-chapter 3: proportionate cover

ORIENTATION

relevance to the EquitasRe-assured-at-Lloyd's

- 3.33** RRC 4, Sch. 3's Proportionate Cover Plan — designed to avoid²³⁰ the appearance, rather than deal fully with the reality, of insolvency at Equitas Re — has been de-

²²⁰ RRC 7, §2.7.

²²¹ See generally RRC 7, §2.7.

²²² RRC 7, §2.7(b).

²²³ RRC 7, §2.7(d).

²²⁴ RRC 7, §2.10.

²²⁵ RRC 4, Sch. 3, §12.

²²⁶ RRC 5, Sch. 3, §10.1.

²²⁷ RRC 4, Sch. 3, §10.1.

²²⁸ RRC 5, Sch. 3, §10.1.

²²⁹ RRC 5, Sch. 3, §12.

²³⁰ SOD, p.99: Proportionate Cover Plan is "designed to help avoid Equitas Reinsurance or Equitas Limited, in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement".

scribed as "a mechanism whereby Equitas may pay claims at a reduced rate if liabilities exceed assets at any time in the future".²³¹ Contrary to apparent indications²³² by self-regulators-at-Lloyd's and the DTI (see below), there appears to be no legal basis for the notion that Proportionate Cover has any binding effect on an EquitasRe-assured's-at-Lloyd's own insurance contractual rights against the Lloyd's enterprise. For as long as the Lloyd's enterprise purports to be solvent and trades as a going concern, Proportionate Cover of itself (like any other insolvency process to which Equitas Re may be statutorily or contractually subject) at Equitas Re appears to be irrelevant to those rights. However, Proportionate Cover at was apparently included at the DTI's "request"²³³ to "protect the policyholder"²³⁴ "[g]iven the inherent uncertainty in any insurance business".²³⁵ Appearing to have believed²³⁶ — the belief appears to be erroneous as a matter of statutory and common law and in contract — that Proportionate Cover does bind the EquitasRe-assured-at-Lloyd's, the DTI appears not to have objected to the Council promulgating various Central Fund

²³¹ *SOD*, p.98.

²³² See for example perhaps *SOD*, App. 7, first unnumbered page, §A (italics added): "The Council has concluded that the Reconstruction and Renewal plan: (a) is in the best interests of the Society; and (b) is better than the alternative of allowing the Society to cease to trade and to go into run-off which would inflict severe damage and *increased liabilities* on members."

²³³ *SOD*, App. 5, §1.4 (p.2):-

Given the inherent uncertainty in any insurance business, there is a risk that Equitas may not be able to meet the 1992 and prior liabilities in full. At the request of the DTI, the Reinsurance Contract will contain provisions for the implementation of a proportionate cover plan. In making any decision to implement such a plan, Equitas will be obliged to act in good faith.

And see *ibid.*, §1.12 (p.3):-

The DTI is concerned to ensure the protection of underlying policyholders. Accordingly, Names' rights to recover under the reinsurance obligation contained in the Reinsurance Contract, including all rights in a winding-up of Equitas Reinsurance, will therefore be assigned to Equitas Policyholders Trustee and will be held on trust for the discharge and payment of obligations to policyholders.

And see *ibid.*, p.99:-

At the request of the DTI, a plan has been designed to help avoid Equitas Reinsurance or Equitas Limited, in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement. If Equitas determines that it has insufficient assets to meet all future claims, it can decide whether to implement a proportionate cover plan (or, if such a plan is already in place, to amend the existing plan) or to pursue normal insolvency procedures (including, for example, a scheme of arrangement). If Equitas decides to implement a proportionate cover plan, it will be entitled to pay claims at a reduced rate. It may also defer payment of claims on a temporary basis while details of any plan are being finalised.

²³⁴ The DTI's preliminary view, appended to *SOD*, was that the Secretary of State was satisfied that the interests of assureds-at-Lloyd's would be "suitably protected". *SOD*, App. 4, July 26, 1996 letter to the Corporation's then CEO from the DTI's then Director, Insurance Directorate, that letter, first unnumbered page:-

[T]he Secretary of State is satisfied that the interests of policyholders of Names who cease to be members of the Society with the benefit of Equitas and/or syndicate reinsurance to close will be suitably protected where: (i) the relevant authorisation conditions on Equitas have been lifted and the Equitas reinsurance has become effective; and (ii) Equitas and/or (in respect of a syndicate reinsurance to close) the relevant Lloyd's syndicates continue to pay claims in full without the performance of contracts of insurance reverting in whole or in part to resigned Names.

See incidentally *S&M*, §52(a) (p.18-19):-

Some Names have expressed scepticism about the value of the DTI's role in relation to Names. Certainly, the DTI's statutory obligation is to have regard to the interests of policyholders, including Names, but this is more likely to contribute to the financial viability of Equitas than to the opposite. Furthermore, whatever some Names may regard as the failings of the DTI in the past, the present spotlight of publicity is likely to concentrate the DTI's mind as never before.

²³⁵ *SOD*, App. 5, §1.4.

²³⁶ See DTI March 29, 1996 press release, Lloyd's: Conditional Authorisation of Equitas Proposals. *Ibid.*, p.4: "[I]f against expectations the liabilities of Equitas at some future point should appear to be on the point of exceeding the assets available, arrangements will have been built into the reinsurance contract [RRC 4] with Names designed to ensure that policyholders would continue to receive an uninterrupted flow of claims payments, albeit at less than 100 percent".

use and contribution restrictions, and appears to have made no effort to refer, or require the Lloyd's enterprise to refer, any EquitasRe-assured-at-Lloyd's to available recourse sources at Lloyd's.

Proportionate Cover: orientation

- 3.34** RRC 4, §3.5 permits Equitas Re to repeatedly²³⁷ "adjust"²³⁸ its §3 reinsurance contractual insurance obligations, from their 100% primordial level to any lesser number, on certain "Trigger Events"; each of the Trigger Events precipitating Proportionate Cover bespeaks real-life insolvency processes. Proportionate Cover thus creates the illusion of solvency in circumstances which ordinarily would be considered simple insolvency. Equitas Re is empowered²³⁹ to put in place any successive number of Proportionate Cover Plans and may adjust up or down any Proportionate Cover Rate provided that that rate is always less than 1, which by definition would presumably indicate or presage Equitas Re's Insolvency Act 1986, s.123 inability to pay its debts in full as they fell due. RRC 5 contains substantially similar provisions in relation to Equitas Ltd. Given that company's role as the Equitas Group's principal operating company, Proportionate Cover is likely to start as a Retrocession Plan²⁴⁰ at Equitas Ltd. Equitas Re would presumably find it impossible as a practical matter not thereafter to sustain its own RRC 4, Sch. 3, §2.1 or 2.3 Reinsurance Trigger Event and thus implement (subject to the latitude²⁴¹ built into RRC 4, Sch. 3) a Proportionate Cover Plan. That event of itself does not constitute a RRC 7, §2.15 Insolvency Event such as to require Equitas Policyholders Trustee's *ibid.*, §2.4 *et seq.* intervention on behalf of EquitasRe-assureds-at-Lloyd's; indeed, it (and even its mere unutilised availability²⁴²) protects²⁴³ Equitas Re from that intervention. Equitas Re and Equitas Ltd. each respectively promise "for the benefit of the Names and Closed Year Names" — the assured-at-Lloyd's is not mentioned — to act "bona fide"²⁴⁴ and take "all reasonable skill, care and diligence"²⁴⁵ in "arriving"²⁴⁶ at a decision to activate a such a plan (suggesting a transparent and robust decision-making process).

TRIGGER EVENTS AND THEIR CONSEQUENCES

orientation

four types

- 3.35** RRC 4, Sch. 3 provides in relation to Equitas Re for a "Certified Reinsurance Trigger Event" and an "Automatic Reinsurance Trigger Event". RRC 5, Sch. 3 provides in relation to Equitas Ltd. for a "Certified Trigger Event" and an "Automatic Trigger Event". Trigger Events precipitate consideration of proportionate cover.

²³⁷ RRC 4, Sch. 3, §4; RRC 5, Sch. 3, §4.

²³⁸ RRC 4, Sch. 3, §3.1 *et seq.*; RRC 5, Sch. 3, §3.1 *et seq.*

²³⁹ RRC 4, Sch. 3, §4.

²⁴⁰ See generally RRC 5, §2.4 and *ibid.*, Sch. 3.

²⁴¹ See generally RRC 4, Sch. 3, §§5.1, 8.1, 8.2, etc.

²⁴² See RRC 7, §2.15(c)(ii).

²⁴³ See RRC 7, §2.15(c)(i) and (ii).

²⁴⁴ RRC 4, §3.6.

²⁴⁵ RRC 4, §3.6.

²⁴⁶ RRC 4, §3.6.

consultation with Insurance Creditors and regulators

- 3.36** Equitas Re's board becomes "entitled" to consult with "Insurance Creditors" (as defined²⁴⁷) in relation to the Proportionate Cover Rate when a Certified Reinsurance Trigger Event does occur, or when Equitas Re's board becomes aware of facts or circumstances which the board considers make a Certified Reinsurance Trigger Event "likely".²⁴⁸ In relation to a Proportionate Cover Plan arising from a "Certified" or "Automatic" "Reinsurance Trigger Event", Equitas Re's board is "entitled" to consult with such regulatory authorities as it considers appropriate with a view to particularly ensuring that "Dedicated Assets" (as defined) are applied "in the manner and at the rate contemplated by the Proportionate Cover Plan and not otherwise",²⁴⁹ including, presumably, not as originally contemplated if different. There is no such consultation provision in relation to an Automatic reinsurance Trigger Event. At Equitas Ltd., on a Certified Trigger Event, or on Equitas Ltd.'s board becoming aware of facts or circumstances which it considers makes such an Event "likely", the board becomes entitled but not obliged to consult with all or some Insurance Creditors (presumably as defined elsewhere²⁵⁰) in relation to the setting of a Retrocession Rate, suspension of payments, or other matters in Equitas Ltd.'s sole discretion.²⁵¹

"Certified"**at Equitas Re**

- 3.37** Equitas Re's board must activate a Proportionate Cover Plan in any of three so-called "Certified Reinsurance Trigger Events":²⁵² At Equitas Re, a "Certified Reinsurance Trigger Event" is: (1) an Equitas Re Proportionate Cover Plan not being already in effect, if Equitas Re's board determines, taking into account Equitas Re's prospective and contingent liabilities and after providing to pay Equitas Re's General Creditors in full, that the Relevant Original Liabilities would exceed Relevant Available Assets (as valued on a going-concern basis²⁵³) but for a Proportionate Cover Plan.²⁵⁴ To the extent that Equitas Re decides to adjust its liability to EquitasRe-reinsured SYA participants, and that Equitas Ltd. decides to adjust its liability to Equitas Re, each agrees to take that adjusting decision "for the benefit of the Names and Closed Year Names", and "bona fide"²⁵⁵ and take "all reasonable skill, care and diligence"²⁵⁶ in "arriving"²⁵⁷ at a relevant decision; (2) an Equitas Re Proportionate Cover Plan being already in effect, if Equitas Re's board determines, taking into account Equitas Re's prospective and contingent liabilities and after providing to pay Equitas Re's General Creditors in full, that the Relevant Original Liabilities would exceed Relevant Available Assets (as valued on a going-concern

²⁴⁷ See its definition at RRC 4, Sch. 2, §1.

²⁴⁸ RRC 4, Sch. 3, §2.4.

²⁴⁹ RRC 4, Sch. 3, §6.3.

²⁵⁰ "Insurance Creditors" is not defined in either RRC 5 or RRC 5, Sch. 3.

²⁵¹ RRC 5, Sch. 3, §2.4.

²⁵² See generally RRC 4, Sch. 3, §2.1.

²⁵³ RRC 4, Sch. 3, §2.2.

²⁵⁴ RRC 4, Sch. 3, §2.1(a).

²⁵⁵ RRC 4, §3.6.

²⁵⁶ RRC 4, §3.6.

²⁵⁷ RRC 4, §3.6.

basis²⁵⁸) given the current Proportionate Cover Rate;²⁵⁹ (3) Equitas Re's receipt of a notice from Equitas Ltd. that a "Certified Trigger Event" (as defined in RRC 5²⁶⁰) or "Automatic Trigger Event" (as defined in RRC 5²⁶¹) has occurred.²⁶² In the first two cases, such determination must take into account provision for paying Equitas Re's General Creditors (as defined;²⁶³ as distinct from Insurance Creditors) in full.

at Equitas Ltd.

- 3.38** At Equitas Ltd., a "Certified Trigger Event" occurs when Equitas Ltd.'s board determines that relevant unadjusted²⁶⁴ liabilities exceed relevant assets, whether or not a Retrocession Plan is in effect.²⁶⁵

"adjustment" on a "Certified Reinsurance Trigger Event"

- 3.39** On the occurrence of a "Certified Reinsurance Trigger Event",²⁶⁶ Equitas Re's liabilities to EquitasRe-reinsured SYA participants and other so-called "Reinsured Parties"²⁶⁷ in relation to the entirety²⁶⁸ of current outstanding "Reinsurance Indemnities" must²⁶⁹ be "adjusted" to equal²⁷⁰ {Original Liability²⁷¹ x Proportionate Cover Rate²⁷² + any Adjustment Entitlement²⁷³}. The adjustment takes effect on and from the date specified by Equitas Re's board in the relevant Interim Proportionate Cover Declaration,²⁷⁴ which declaration Equitas Re's board must issue "promptly" after the occurrence.²⁷⁵ The only eventualities excusing Equitas Re from then having to actually implement a Proportionate Cover Plan if one is not already in place, or to adjust an existing Proportionate Cover Plan's Proportionate Cover Rate, are those specified at RRC Sch 3, §8 (discussed below).²⁷⁶ In order to implement a Proportionate Cover Plan in the case of a Certified Reinsurance Trigger Event, Equitas Re's board must "without undue delay" determine as at the "Record Date": (1) the value of the "Available Assets"; (2) the value of "US Trust Assets"; (3) the value of the "ECTF Assets"; (4) the value of the "Australian Custody Assets"; (5) the amount of the "Original Liabilities"; (6) the amount of the "Relevant Original Liabilities" applicable to "American Business", "Canadian Business", "Australian

²⁵⁸ RRC 4, Sch. 3, §2.2.

²⁵⁹ RRC 4, Sch. 3, §2.1(b).

²⁶⁰ The definition is at RRC 5, Sch. 3, §2.1: RRC 4, Sch. 3, §2.1(c).

²⁶¹ The definition is at RRC 5, Sch. 3, §2.3: RRC 4, Sch. 3, §2.1(c).

²⁶² RRC 4, Sch. 3, §2.1(c).

²⁶³ At RRC 4, Sch. 2, §1.

²⁶⁴ See RRC 5, §2.4.

²⁶⁵ RRC 5, Sch. 3, §2.1(a) (Retrocession Plan not in effect) and *ibid.*, (b) (Retrocession Plan in effect). "Relevant Original Liabilities" and "Relevant Available Assets" are the terms used. See also the definition at *ibid.* of "Available Assets" and "General Creditors".

²⁶⁶ See generally RRC 4, Sch. 3, §2.

²⁶⁷ RRC 4, Sch. 3, §3.1. For definition of "Reinsured Parties", see RRC 4, Sch. 2, §1.

²⁶⁸ RRC 4, Sch. 3, §5.3.

²⁶⁹ RRC 4, Sch. 3, §3.1.

²⁷⁰ RRC 4, Sch. 3, §3.1.

²⁷¹ Defined at RRC 4, Sch. 2, §1.

²⁷² Defined at RRC 4, Sch. 2, §1.

²⁷³ Defined at RRC 4, Sch. 2, §1.

²⁷⁴ RRC 4, Sch. 3, §3.2. Defined at RRC 4, Sch. 2, §1.

²⁷⁵ RRC 4, Sch. 3, §3.2.

²⁷⁶ RRC 4, Sch. 3, §5.1.

Business", and "Residual Business"; (7) the amount owing to "General Creditors". Equitas Re's board appears to be given latitude to make other, unspecified determinations, but the provision is vague.²⁷⁷ In any of these determinations, Equitas Re's board is entitled to rely on evidence supplied by Equitas Ltd.²⁷⁸

RRC 4, Sch 3, §8: where no adjustment required

- 3.40** Adjustment is a mandatory element in Equitas Re's board's declaration of a Certified Reinsurance Trigger Event unless Equitas Re is put on notice that Equitas Ltd.'s board: (1) is "to take"²⁷⁹ "any action" "with a view to either Equitas Ltd.'s liquidation²⁸⁰ or to promoting" either a Companies Act 1985, s.425 scheme of arrangement or Insolvency Act 1986, Part I voluntary arrangement.²⁸¹ If Equitas Re's board does propose a Companies Act 1985, s.425 arrangement or compromise after a Certified Reinsurance Trigger Event has occurred, Equitas Re's liability in relation to "Relevant Reinsurance Indemnities" (as defined²⁸²) is as revised under RRC 4, Sch. 3 unless and until varied by such arrangement or compromise as may be approved;²⁸³ (2) is "to"²⁸⁴ exercise its rights to take advantage of some other available insolvency resort;²⁸⁵ (3) to apply to the court for the appointment of a provisional liquidator for Equitas Ltd.²⁸⁶ In any such event, Equitas Re's board is empowered to do the same thing.²⁸⁷

suspension of relevant payments

- 3.41** On the occurrence of a Certified Reinsurance Trigger Event, Equitas Re becomes entitled under RRC 4, Sch. 3 to reduce or suspend payments in relation to RRC 4 Reinsurance Indemnities.²⁸⁸ Equitas Re may exercise that right only for "the minimum period reasonably necessary"²⁸⁹ and only if at the same or about the same time it also exercises the equivalent power granted pursuant to all other Reinsurance Indemnities.²⁹⁰ The power to reduce or suspend is expressly limited to payments further to Equitas Re's Reinsurance Indemnities.²⁹¹ To the extent that Equitas Re does avail itself of the power to reduce or suspend, each EquitasRe-reinsured SYA participant agrees not to take any step or proceeding against Equitas Re or its property, in any jurisdiction, to enforce Equitas Re's performance of its Reinsurance Indemnities;²⁹² or to apply to the court under Insurance Companies Act 1982, s.53 for

²⁷⁷ See RRC 4, Sch. 3, §5.1, last line.

²⁷⁸ RRC 4, Sch. 3, §5.2.

²⁷⁹ Ambiguous: could mean "will take" or "is required to take".

²⁸⁰ RRC 4, Sch. 3, §8.1(b) and *ibid.*, §5.1.

²⁸¹ RRC 4, Sch. 3, §8.1(a) and *ibid.*, §5.1.

²⁸² Defined at RRC 4, Sch. 2, §1.

²⁸³ RRC 4, Sch. 3, §11.

²⁸⁴ Ambiguous: could mean "about to", "going to", etc.

²⁸⁵ RRC 4, Sch. 3, §8.1(c) and *ibid.* §5.1.

²⁸⁶ RRC 4, Sch. 3, §8.1 (*cf. ibid.*, §2.3(c) — the actual appointment of a provisional liquidator) and *ibid.* §5.1.

²⁸⁷ RRC 4, Sch. 3, §8.1.

²⁸⁸ See generally RRC 4, Sch. 3, §9.

²⁸⁹ RRC 4, Sch. 3, §9, first sentence.

²⁹⁰ RRC 4, Sch. 3, §9, first sentence, proviso.

²⁹¹ RRC 4, Sch. 3, §9, second sentence.

²⁹² RRC 4, Sch. 3, §9(a).

leave to petition for Equitas Re's winding up, or take or seek to take any action under any statutory or common law power, including Insolvency Act 1986, s.122.²⁹³

"Automatic"

at Equitas Re

- 3.42** Equitas Re's board is required²⁹⁴ to adjust the company's liabilities using a Proportionate Cover Rate — but appears to have no obligation or power to implement a Proportionate Cover Plan properly so defined²⁹⁵ — in any of three so-called "Automatic Reinsurance Trigger Events":²⁹⁶ At Equitas Re, an Automatic Reinsurance Trigger Event is: (1) the passing of a resolution by the company's member — Equitas Holdings — to put Equitas Re into voluntary liquidation;²⁹⁷ (2) the making of a court order compulsorily winding up Equitas Re;²⁹⁸ (3) the actual²⁹⁹ appointment of a provisional liquidator for Equitas Re.³⁰⁰ The Automatic Trigger Event is no less even if the court happens to then exercise its Insolvency Act 1986, s.177 power to appoint a special manager in a way which circumvents the provisional liquidator: the Automatic Trigger Event is the provisional liquidator's appointment, not the exercise of any of his functions.

at Equitas Ltd.

- 3.43** At Equitas Ltd., an "Automatic Trigger Event" is: (1) the passing of a resolution by the company's member — Equitas Re — to put Equitas Ltd. into voluntary liquidation;³⁰¹ (2) the making of a court order compulsorily winding up Equitas Ltd.;³⁰² (3) the appointment of a provisional liquidator of Equitas Ltd.³⁰³

what happens on an "Automatic Reinsurance Trigger Event"?

- 3.44** Equitas Re has no power to itself implement any sort of Proportionate Cover Plan (properly defined) in the case of any of the three kinds of Automatic Reinsurance Trigger Event. In such latter events, Equitas Re is required to adjust its liabilities,³⁰⁴ and the adjustment does then take effect,³⁰⁵ but implementing the adjustment is for the liquidator or provisional liquidator.³⁰⁶ RRC 4 does not clearly spell out the effect of an Automatic Reinsurance Trigger Event and appears to defectively³⁰⁷ define "Proportionate Cover Plan". Before its incarceration in a liquidation or provisional liquidation, Equitas Re is required and empowered to recalibrate its relevant

²⁹³ RRC 4, Sch. 3, §9(b).

²⁹⁴ RRC 4, Sch. 3, §3.1.

²⁹⁵ Cf. RRC 4, Sch. 3, §5.1 (applicable only to a Certified Reinsurance Trigger Event). And see RRC 7, §2.15(b) compared to *ibid.*, (c).

²⁹⁶ See generally RRC 4, Sch. 3, §2.3.

²⁹⁷ RRC 4, Sch. 3, §2.3(a).

²⁹⁸ RRC 4, Sch. 3, §2.3(b).

²⁹⁹ Cf. RRC 4, §8(1) (Equitas Ltd.'s mere intention to apply to the court for the appointment of a provisional liquidator, which is not an Automatic Reinsurance Trigger Event).

³⁰⁰ RRC 4, Sch. 3, §2.3(c).

³⁰¹ RRC 5, Sch. 3, §2.3(a).

³⁰² RRC 5, Sch. 3, §2.3(b).

³⁰³ RRC 5, Sch. 3, §2.3(c).

³⁰⁴ See RRC 4, Sch. 3, §3.1.

³⁰⁵ See RRC 4, Sch. 3, §3.3.

³⁰⁶ See for example RRC 4, Sch. 3, §10.1. And see RRC 7, §2.15(b).

³⁰⁷ When read with RRC 4, Sch. 3, §§3.1 and 5.1.

liabilities, and that recalibration is then automatically imposed as at the effective date³⁰⁸ on the liquidator or provisional liquidator (and to some extent similarly in the case of a s.425 scheme of arrangement³⁰⁹). In the case, on the other hand, of a Certified Reinsurance Trigger Event: Equitas Re's obligatory adjustment, that adjustment then takes effect, and Equitas Re then takes the additional required step of implementing³¹⁰ a (properly defined) Proportionate Cover Plan, a process which does protect³¹¹ Equitas Re from a RRC 7, §2.15(c) Insolvency Event (and thus from Equitas Policyholders Trustee's compulsory intervention). The compulsory, RRC 4, Sch. 3, §3.1 adjustment takes effect on and from the date of the event itself.³¹² Equitas Re's liability to EquitasRe-reinsured SYA participants under Equitas Re's Reinsurance Indemnity must be determined in accordance with RRC 4, Sch. 3, §6 just as in the case of a Certified Reinsurance Trigger Event,³¹³ and a Proportionate Cover Declaration issued;³¹⁴ the requirement³¹⁵ for Equitas Re's board to issue an Interim Proportionate Cover Declaration in the context of a Certified Reinsurance Trigger Event does not apply to an Automatic Reinsurance Trigger Event. Equitas Re's liquidator is empowered to recalculate the rate.³¹⁶

proportionate cover at Equitas Re

procedure

- 3.45** Equitas Re's RRC 4, Sch. 3 obligations to adjust relevant liabilities, determine a Proportionate Cover Rate and implement a Proportionate Cover Plan appear to be qualified by RRC 4, Sch. 3, §8.2, a provision of purportedly general applicability, that nothing in *ibid.*, Sch. 3 is to be construed as limiting Equitas Re's board to take such action as it may consider appropriate, including implementing any *ibid.*, §8 insolvency procedure in substitution for a Proportionate Cover Plan or, presumably, not adjusting under *ibid.*, §3 or implementing a Proportionate Cover Plan under *ibid.* §5. In whatever it does choose to do under RRC 4, Sch. 3, Equitas Re's board is entitled to rely on professional advice, and its board's determinations bind EquitasRe-reinsured SYA participants conclusively.³¹⁷ No EquitasRe-reinsured SYA participant or other party to RRC 4 has any claim against Equitas re or Equitas Ltd., or their respective officers, directors or employees, arising directly or indirectly from any decision taken or not taken concerning RRC 4, Sch. 3's application.³¹⁸ *SOD*³¹⁹ distinguishes (in relation at least to Equitas Policyholders Trustee) between Proportionate Cover Plan and other insolvency processes.

³⁰⁸ See RRC 4, Sch. 3, §3.3.

³⁰⁹ See RRC 4, Sch. 3, §11.

³¹⁰ See RRC 4, Sch. 3, §5.1.

³¹¹ See RRC 7, §2.15(c)(i) (actual use of a Proportionate Cover Plan) and (ii) (potential use not disavowed).

³¹² RRC 4, Sch. 3, §3.3.

³¹³ RRC 4, Sch. 3, §10.1

³¹⁴ RRC 4, Sch. 3, §7 read with *ibid.*, §10.1.

³¹⁵ At RRC 4, Sch. 3, §3.2.

³¹⁶ RRC 4, Sch. 3, §10.1.

³¹⁷ RRC 4, Sch. 3, §14.

³¹⁸ RRC 4, Sch. 3, §14.

³¹⁹ See generally for example *SOD*, p.82:-

Equitas Policyholders Trustee limited will act as trustee of rights of Names under the Reinsurance Contract (other than the rights to return premiums and rights to certain other payments) which it will hold for the benefit of underlying policyholders. Equitas Policyholders Trustee will not have an active role in the payment of policyholders' claims in the ordinary course of business, nor in circumstances where proportionate cover is invoked. However, if any insolvency procedure in relation to Equitas were invoked, Equi-

the Rate and the Plan distinguished

- 3.46** Of the genus "Proportionate Cover", there appear to be two types. Either of a Certified or an Automatic Reinsurance Trigger Event requires³²⁰ Equitas Re to recalibrate its relevant liabilities using a Proportionate Cover Rate,³²¹ but only a *Certified* Reinsurance Trigger Event requires³²² Equitas to "implement" a Proportionate Cover Plan. Every Proportionate Cover Plan involves a Proportionate Cover Rate, but apparently not *vice versa*. A Proportionate Cover Plan's four principal ingredients appear to be the occurrence of a Certified Reinsurance Trigger Event;³²³ adjustment;³²⁴ that adjustment then taking effect;³²⁵ and Equitas Re's further overt act of implementation.³²⁶ RRC 4, Sch. 2, §1's definition of "Proportionate Cover Plan" is therefore defective: because of the additional step of implementation at RRC 4, Sch. 3, §5.1, reserved to a Certified Reinsurance Trigger Event, neither adjustment³²⁷ nor the adjustment taking effect³²⁸ amounts to a Proportionate Cover Plan. Any use of the term "Proportionate Cover Plan" in the case of an Automatic Reinsurance Trigger Event would appear to be erroneous.

the four rates

- 3.47** When Equitas Re has determined a Proportionate Cover Rate, it must "promptly" issue a Proportionate Cover Declaration,³²⁹ which, in the case of a Certified Reinsurance Trigger Event, presumably supersedes the Interim Proportionate Cover Declaration already issued.³³⁰ The Proportionate Cover Rate appears to be not necessarily one but, depending on the circumstances, up to³³¹ four separate rates. However many rates are involved, each must be a number less³³² than 1.³³³ The rates are: (1) the "US Trust Rate",³³⁴ viz., the rate at which liabilities applicable to "American Business"³³⁵ (excluding "Illinois Retained Business"³³⁶) "may"³³⁷ be discharged

tas Policyholder Trustee would be entitled to prove in the insolvency and would distribute any funds it received among policyholders on a pro rata basis.

And see *ibid.*, p.112:-

A proportionate cover plan would enable Equitas to continue paying a proportion of policyholder claims if it were ever confronted with a shortfall of assets and would enable Equitas to avoid the cessation of claims payment which would otherwise follow if Equitas were forced into insolvency. This procedure will also benefit Names, in that they would avoid the obligation of having to pay the full amount of their liabilities if Equitas were forced to cease paying claims.

³²⁰ See RRC 4, Sch. 3, §3.1.

³²¹ See RRC 4, Sch. 3, §3.1(i).

³²² See RRC 4, Sch. 3, §5.1.

³²³ See RRC 4, Sch. 3, §5.1, enabling Equitas Re's "implementation" of a Proportionate Cover Plan only in the case of a Certified Reinsurance Trigger Event.

³²⁴ See RRC 4, Sch. 3, §3.1.

³²⁵ See RRC 4, Sch. 3, §3.2.

³²⁶ At RRC 4, Sch. 3, §5.1.

³²⁷ See RRC 4, Sch. 3, §3.1.

³²⁸ See RRC 4, Sch. 3, §§3.2 and 3.3.

³²⁹ RRC 4, Sch. 3, §7. Defined at *ibid.*, Sch. 2, §1.

³³⁰ Per RRC 4, Sch. 3, §3.2.

³³¹ The "Australian Rate" is calculated only if "applicable": RRC 4, Sch. 3, §6.1(a)(iv).

³³² RRC 4, Sch. 3, §4 prohibits payment by Equitas Re of more than all of a particular liability.

³³³ See for example the equation at RRC 4, Sch. 3, §3.1(i).

³³⁴ RRC 4, Sch. 3, §6.1(a)(ii).

³³⁵ Note the terminological disparity "American" and "US" at for example RRC 4, Sch. 3, §6.1. Per RRC 4, Sch. 2, §1, "American Business" means the same as in the EATD.

³³⁶ Defined at RRC 4, Sch. 2, §1.

solely from "US Trust Assets";³³⁸ (2) the "ECTF Rate";³³⁹ viz., the rate at which "liabilities applicable to Canadian Business"³⁴⁰ "may"³⁴¹ be discharged solely from "ECTF Assets";³⁴² (3) the "Australian Rate";³⁴³ viz., the rate at which the "Australian Business"³⁴⁴ "may"³⁴⁵ be discharged solely from the "Australian Custody Assets";³⁴⁶ (4) the "Residual Business Rate";³⁴⁷ viz., the rate at which Equitas Re "can"³⁴⁸ discharge its "Relevant Original Liabilities" for "Residual Business"³⁴⁹ from its "Non-Dedicated Available Assets".³⁵⁰ The principles governing³⁵¹ the determination of each rate appear to be embedded as prescriptive parts of the RRC 4, Sch. 2, §1 definitions of each rate. There is one provision applicable only to the Residual Business Rate, viz., Equitas Re, in calculating that rate and in calculating any additional specific relevant Residual Business Rate in a particular jurisdiction, is entitled to take into account the fact (if Equitas Re is "satisfied" about it) that insurance creditors in that jurisdiction will be paid from assets available only to pay such creditors.³⁵²

proportionate cover at Equitas Ltd.

orientation

- 3.48** RRC 5, Sch. 3 makes provision (apparently at the DTI's request³⁵³) for Equitas Ltd.'s actual or anticipated inability to pay "Original Liabilities" (as defined³⁵⁴) by providing for Equitas Ltd.'s board to (for example³⁵⁵): (1) impose the exact proportionate cover equivalent at Equitas Ltd. — including the lack of clarity in RRC 4,

³³⁷ RRC 4, Sch. 2, §1, definition of "US Trust Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. Cf. "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³³⁸ Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "US Trust Rate".

³³⁹ RRC 4, Sch. 3, §6.1(a)(iii). Erroneously "ECTF Trust Rate" at RRC 4, Sch. 3, §6.1(b), (c) and (d). There is no such term in RRC 4, Sch. 2 ("Definitions and interpretation").

³⁴⁰ RRC 4, Sch. 2, §1, definition of "ECTF Rate". Cf. the different wording at for example *ibid.*'s definition of "Australian Rate" and the yet different wording at for example *ibid.*'s definition of "Residual Business Rate". Per RRC 4, Sch. 2, §1, "Canadian Business" has the same meaning as in the Equitas Canadian TD.

³⁴¹ RRC 4, Sch. 2, §1, definition of "ECTF Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. Cf. "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³⁴² Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "ECTF Rate".

³⁴³ RRC 4, Sch. 3, §6.1(a)(iv).

³⁴⁴ Defined at RRC 4, Sch. 2, §1.

³⁴⁵ RRC 4, Sch. 2, §1, definition of "Australian Rate". Ambiguous (capable of meaning "may be able to", "is permitted to") and therefore to some extent meaningless. Cf. "can" in (for example) *ibid.*'s definition of "Residual Business Rate".

³⁴⁶ Defined at RRC 4, Sch. 2, §1. And see *ibid.*, definition of "Australian Rate".

³⁴⁷ RRC 4, Sch. 3, §6.1(a)(i).

³⁴⁸ RRC 4, Sch. 2, §1, definition of "Residual Business Rate". Cf. "may" in (for example) *ibid.*'s definition of "Australian Rate".

³⁴⁹ Defined at RRC 4, Sch. 2, §1.

³⁵⁰ RRC 4, Sch. 2, §1, definition of "Residual Business Rate".

³⁵¹ See RRC 4, Sch. 3, §6.1, first sentence.

³⁵² RRC 4, Sch. 3, §6.2.

³⁵³ SOD, p.99: "At the request of the DTI, a plan has been designed to help avoid Equitas Reinsurance or Equitas Ltd., in the event that either becomes unable to pay the 1992 and prior liabilities in full, going into insolvent liquidation or having to promote a scheme of arrangement."

³⁵⁴ Defined at RRC 5, Sch. 3, §17.

³⁵⁵ Relevant provisions are at RRC 5, Sch. 3, §5, 6 and 8.

Sch. 2, §1's definition³⁵⁶ of "Retrocession Plan"³⁵⁷ — of Equitas Re's RRC 4, Sch. 3 proportionate cover. Equitas Ltd. is a party to RRC 4 in order to undertake to EquitasRe-reinsured SYA participants that it will act in good faith in exercising its own proportionate cover functions.³⁵⁸ The cover's precipitates are Certified Trigger Events³⁵⁹ and Automatic Trigger Events,³⁶⁰ and the determination³⁶¹ of a downward multiplier (the Retrocession Rate as defined³⁶²) in relation to each of four categories of business (American, Australian, Canadian and Residual). The plan may be used more than once;³⁶³ (2) take any action with a view to winding up Equitas Ltd.³⁶⁴ or promoting a Companies Act 1985, s.425 scheme of arrangement³⁶⁵ or Insolvency Act 1986, Part I voluntary arrangement.³⁶⁶ This in turn could³⁶⁷ precipitate an Automatic Reinsurance Trigger Event at Equitas Re; (3) exercise any rights it may have to use any other insolvency, moratorium, reorganisation or reconstruction procedure available to it as an authorised insurance company.³⁶⁸

when proportionate cover at Equitas Ltd. takes effect; suspension of payment

- 3.49** Proportionate cover at Equitas Ltd. takes effect: (1) in relation to a Certified Trigger Event, from the date specified by Equitas Ltd. in its public advertisement — the so-called Interim Retrocession Declaration³⁶⁹ (as defined³⁷⁰). There appears, as at Equitas Re,³⁷¹ to be the additional step of Equitas Ltd. choosing to "implement" the proportionate cover in the form of a Retrocession Plan; (2) in relation to an Automatic Trigger Event, on and with effect from the date of the relevant liquidation resolution, order or appointment.³⁷² RRC 5 permits Equitas Ltd. to suspend all payments under, and only under,³⁷³ its Retrocession Indemnity to Equitas Re pending its board making a decision as to which available option to pursue,³⁷⁴ and Equitas Re promises — pending that decision — not to take any step or bring any proceedings against Equitas Ltd.³⁷⁵

³⁵⁶ Defined at RRC 5, Sch., 3§17.

³⁵⁷ See generally RRC 5, §2.4 and *ibid.*, Sch. 3, 5.1.

³⁵⁸ *SOD*, p.99.

³⁵⁹ See RRC 5, Sch. 3, §2.1.

³⁶⁰ See RRC 5, Sch. 3, §2.3.

³⁶¹ See RRC 5, Sch. 3, §§3.1 and 6.

³⁶² Defined at RRC 5, Sch. 3., §17.

³⁶³ RRC 5, Sch. 3, §4.

³⁶⁴ RRC 5, Sch. 3, §8.1(b).

³⁶⁵ RRC 5, Sch. 3, §8.1(a); and see *ibid.*, §11.

³⁶⁶ RRC 5, Sch. 3, §8.1(a).

³⁶⁷ See RRC 4, Sch. 3, §8.1. *Cf.* for example *SOD*, p.99 ("If a proportionate cover plan is implemented by Equitas Limited, Equitas Reinsurance *will* likewise implement a proportionate cover plan"; italics added).

³⁶⁸ RRC 5, Sch. 3, §8.1(c).

³⁶⁹ RRC 5, Sch. 3, §3.2.

³⁷⁰ See the definition in RRC 5, Sch. 3, §17.

³⁷¹ See RRC 4, Sch. 3, §5.1.

³⁷² RRC 5, Sch. 3, §3.3(i)-(iii).

³⁷³ RRC 5, Sch. 3, §9.

³⁷⁴ RRC 5, Sch. 3, §9.

³⁷⁵ RRC 5, Sch. 3, §9(a) and (b).

"Retrocession Rate"

- 3.50** RRC 5 provides that Equitas Ltd.'s liability to honour in full its Retrocession Indemnities (as defined³⁷⁶) to Equitas Re are to be adjusted³⁷⁷ so as to equal the sum of: {Original Liability x Retrocession Rate + any relevant Adjustment Entitlement}.³⁷⁸ The starting point in determining the Retrocession Rate is to categorise³⁷⁹ Equitas Ltd.'s obligations in terms of American Business,³⁸⁰ Australian Business,³⁸¹ Canadian Business,³⁸² and Residual Business.³⁸³ RRC 5 provides for determination of a separate Retrocession Rate for each business category,³⁸⁴ and requires the amount of each raw rate to be taken into account when setting the final Retrocession Rate.³⁸⁵ Similar principles apply in relation to Equitas Ltd.'s liability in relation to a Relevant Retrocession Indemnity (as defined³⁸⁶) on Equitas Ltd.'s liquidation.³⁸⁷ RRC 5 also provides for upward adjustment of payments from Equitas Ltd. to Equitas Re where, during the currency of a Retrocession Plan, an upward adjustment is made in a Relevant Retrocession Rate and Equitas Re has itself paid out on a Reinsurance Indemnity at the lower rate.³⁸⁸

³⁷⁶ Defined at RRC 5, Sch. 3, §17.

³⁷⁷ And see RRC 5, §2.4.

³⁷⁸ RRC 5, Sch. 3, §3.1(i) and (ii). See *ibid.*, §17's definition of "Adjustment Entitlement".

³⁷⁹ See generally RRC 5, Sch. 3, §6.1 *et seq.*

³⁸⁰ Defined at RRC 5, Sch. 3, §17.

³⁸¹ Defined at RRC 5, Sch. 3, §17.

³⁸² Defined at RRC 5, Sch. 3, §17.

³⁸³ Defined at RRC 5, Sch. 3, §17.

³⁸⁴ See generally RRC 5, Sch. 3, §6.1(a)(i) (Residual Business Rate); *ibid.*, §(ii) (US Trust Rate); *ibid.*, §(iii) (ECTF Rate) and *ibid.*, §(iv) (Australian Rate).

³⁸⁵ See RRC 5, Sch. 3, §6.1(b)-(d). The provisions are obscure.

³⁸⁶ Defined at RRC 5, Sch 3, §17.

³⁸⁷ See RRC 5, Sch. 3, §10.1 (subject to the liquidator's duty to comply with relevant law: *ibid.*, §10.2).

³⁸⁸ See RRC 5, Sch. 3, §13.

4: CLAIMS PAYMENT SECURITISATION FUNDS AND INSOLVENCY

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Sub-Chapter 1: funds and insolvency

ORIENTATION

scope of Sub-Chapter

- 4.1** The present Sub-Chapter introduces the availability of certain PU and CU, MO and BO claims payment securitisation funds (more generally considered elsewhere¹).

claims payment securitisation funds introduced

no PCP at Lloyd's; no customised security

- 4.2** No part of the Lloyd's enterprise, including the Corporation, a Member, SYA participant or the Central Fund, has its own inherent, implied or express proportionate payment plan,² consistent with the Lloyd's enterprise's insinuations of 100% payment (presumptively in BBSN circumstances) of every valid claim. No SYA participant confers any first- or third-party security (including any mortgage, charge, lien, guarantee or LOC) directly on any assured-at-Lloyd's³ to securitise claims or commutation payment by himself or any SYA participant. The contrary would be commercially and logistically impracticable to effect, monitor and enforce in relation to a poly-slip subscribed by traditional poly-stamps. Nor in any other sense does the assured-at-Lloyd's — not considering himself to be at the mercy of the assets merely of the particular SYA participants who sold him insurance —

¹ Viz., *Astor's Law of Lloyd's*, 2nd Ed.

² Cf. *EquitasRe* (at RRC 4) and *Equitas Ltd.* (at RRC 5), discussed in Chapter 3. The mistake usually made by *EquitasRe*-assureds-at-Lloyd's is to assume that *Equitas Re's* PCP is binding on them.

³ Cf., for example, as a litigant holding pre-answer security (in the form of a LOC or otherwise).

bargain for recourse to every or any subscribing SYA participant *solus*,⁴ and accordingly performs no due diligence on any SYA participant (including through his Lloyd's broker).

enterprise-level security

- 4.3 Rather, the Lloyd's enterprise is commercially, financially, regulatorily,⁵ administratively and procedurally predicated on the Lloyd's enterprise honouring its current, persistent⁶ and insistent⁷ centrally issued blandishments of 'chain of security',⁸ 'common security',⁹ 'superior security', etc. (*cf.* such uninformative and apparently contradictory Lloyd's policy boilerplate as 'each for his own part and not one for another') by routinely furnishing various PU and CU, dedicated and not-dedicated, MO and BO and other¹⁰ funds,¹¹ in the hands of remote MO and or BO trustees and relevant others, available (in principle) alike to him and others similarly entitled, stocked with money from whatever BO sources (if any¹²) may happen to be properly available to the Lloyd's enterprise, from which funds — especially the so-called 'working funds'¹³ — the necessary sums are extracted in the BO by what may for convenience be termed the enterprise's 'cash conveyor belt'.¹⁴

⁴ *Cf.* the circumstances in *Elgood v Harris* [1896] 2 Q.B. 491 (Collins J; a claim against a bankrupt Member litigated before the introduction of premium sequestration in trust funds).

⁵ See especially relevant NYID and NAIC missives and deliberations, including (for example) *NYID Report 1995*, *NAIC Review 1998*, *NAIC Review 1999*, *NAIC Review 2003*, etc. and the deliberations of relevant NAIC committees, task forces, etc. A FOIA/FOIL search at NYID on relevant trust fund governing instruments is appropriate when doing Recourse Due Diligence™ on what will happen in not-BBSN circumstances in relation to relevant 'American Business' (as that and similar phrases are defined in relevant US trust funds).

⁶ Blandishments made nowadays by self-regulators-at-Lloyd's are strikingly similar to those made by self-regulators-at-Lloyd's in the 1920s: see for example *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J).

⁷ Relevant blandishments are now repeated annually in the Corporation RA and in leaflets such as (for example) *Chain of Security* (various years and versions) and *Security at Lloyd's* (*ditto*).

⁸ See recently Corporation RA fye December 31, 2003, p.50-51.

⁹ See for example *Strengthening Chain*, p.1:-

Late last year, the Lloyd's Market Board reviewed the future development of Lloyd's security and re-confirmed the view that common security behind the policies issued at Lloyd's was advantageous commercially and necessary to preserve Lloyd's trading licences and distinctive marketplace.

¹⁰ The Central Fund is not a trust fund (*cf.* CFUS 2).

¹¹ Caution must be exercised when relying on non-specialist technical accounts of claims payment securitisation at Lloyd's. *Halsbury's Laws* on the subject is a good example. *Per op. cit.*, vol. 25 ('Insurance'), §24 (p.25) (4th Ed., 2003 re-issue): 'Protection for the insured [at Lloyd's] is ensured by the requirement of a deposit by way of security of a minimum sum ... and by a stringent audit of each underwriter's accounts.' This is naïve and misleading. In reality, supposedly stringent audit of itself vouchsafes nothing (as demonstrated by the Lloyd's enterprise's insolvency in 1996). And were the mere Lloyd's deposit sufficient to pay the SYA participant's insurance liabilities, there would be no need for (for example) relevant MO or other BO PU and CU claims payment securitisation funds. The funds do not reflect the external insurance regulator's perception of a particular SYA participant's inability to pay relevant insurance (the regulator does not descend to any such level of financial analysis).

¹² No Accepting Name released from Membership has the slightest obligation to contribute to any relevant BO or MO fund. The legal liability of Members to make sufficient contributions to a sufficient Central Fund will presumably become contentious in not-BBSN circumstances.

¹³ See for example Mkt. Bn. Y2509 (March 26, 2001; 'Amendment of Lloyd's American Instruments for General Business'), p.1. Working and not-working TFs, and their respective mechanics, are discussed at *Astor's Law of Lloyd's*, 2nd Ed.

¹⁴ The process, together with Central Accounting and other financial processing, is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

However much he may aver in general terms contextual¹⁵ contracting, and self-regulators-at-Lloyd's proclaim in general terms 'common security' — both sides thus apparently agreeing on the general principle — in BBSN circumstances the assured-at-Lloyd's relies on the compellability, existence, availability and conduit-based accessibility of such funds. The assured-at-Lloyd's should perform Recourse Due Diligence™ on all relevant such funds before succumbing¹⁶ to invitations to commute any coverage, under any circumstances including a SYA participant's personal insolvency process or s.425 scheme. Some such funds are listed in the Corporation's RA¹⁷ (and in a manner which arguably conjures, infelicitously, one homogenous fund, albeit comprised of a number of different funds¹⁸).

introductory details

- 4.4 The Lloyd's enterprise's RA fye December 31, 2003 lists¹⁹ the following named²⁰ funds (and amounts²¹) as "Security underlying policies issued at Lloyd's": Lloyd's American Trust Funds²² (£342m; US\$612m); Lloyd's Dollar Trust Funds (£4,680m; US\$8,377m); Lloyd's Canadian Trust Funds (£750m; CAN\$1,384m and US\$270m); Lloyd's Canadian Margin Fund (£174m; CAN\$403m); Illinois Trust Fund (£259m; US\$464m); so-called²³ Joint Asset Trust Funds (£242m; US\$434m); Credit for Reinsurance and Surplus Lines Trust Funds (£5,505m; US\$9,854m); Kentucky Trust Fund (£47m; US\$85m); Lloyd's Australian Trust Funds (£361m; Aus\$858m); Lloyd's South African Trust Funds (£55m; Rand656m).²⁴ Familiarity with each fund's governing instrument is a *sine qua non* of being able to perform Recourse Due Diligence™ and accurately and comprehensively advise the assured-

¹⁵ It is a given that the valid-claimant assured-at-Lloyd's contracts (and is so induced by various representations from various parties, such as the local broker, the Lloyd's broker, and self-regulators-at-Lloyd's) in the peculiar regulatory context of the Lloyd's enterprise, with its various relevant customs, usages and practices, and thus for payment from all appropriate sources, not just from the accessible assets of the particular SYA participants with whom he has direct express contractual relations (who may be long dead and untraceable): recourse strictly so confined has never been (nor would it ever be permitted by external insurance regulation to be) the practice at Lloyd's in modern times.

¹⁶ It is presently thought that a material number of US EquitasRe-assureds-at-Lloyd's are substantially uninformed or misinformed of the availability of relevant TFs, such as (for example) Lloyd's US Surplus-Lines CU TF, Lloyd's US Credit-for-Reinsurance CU TF; and see LATFs. These particular trust funds' governing instruments are described in detail at *Astor's Equitas Re Handbook*.

¹⁷ See for example Corporation RA fye December 31, 2003, p.52 *et seq.*

¹⁸ The insinuation at Corporation RA fye December 31, 2003, p.52, that £11.593bn is available to pay claims denominated in pounds to any assured-at-Lloyd's is wholly false. Some of the funds listed on that page are dedicated solely to paying qualifying claims in qualifying currencies.

¹⁹ At *op. cit.*, p.52 (followed by explanatory notes).

²⁰ The list in the main text preserves for convenience the names of each fund given in *op. cit.*, but those names are not always informative or accurate. For example, the word 'joint asset' is wholly misleading. The phrase 'CU' ('CU') is used instead in this work and the Author's other relevant writings. Such matters are elucidated later in the main text.

²¹ The figures are reproduced from Corporation RA fye December 31, 2003, p.52. That reproduction is not to construed as the Author's endorsement of the accuracy of any figure or the sufficiency of any fund. And see *op. cit.*, p.53 ('Notes'), n.5: 'The amount shown in the various US and Canadian dollar trust funds relates purely to the financial investments and other liquid assets held within those funds at the year-end. All other assets and liabilities (excluding insurance reserves) of these funds are accounted for in the balance reported for the Sterling Premiums Trust Funds.'

²² An annotated version of the LATD is at *Astor's Equitas Re Handbook*.

²³ In the Author's relevant writings, these trust funds are called the Lloyd's US Surplus-Lines CU TF and Lloyd's US Credit-for-Reinsurance CU TF. Their presently mandated minimum levels (according to the NAIC, May 26, 2004), are US\$250m and \$104m respectively).

²⁴ Corporation RA fye December 31, 2003, p.52.

at-Lloyd's of his rights in BBSN and not-BBSN circumstances. The external insurance regulatory deliberations which led to the establishing of such funds are often enlightening as to regulatory perceptions of solvency.²⁵

dedicated TFs

- 4.5** Examples of dedicated CU trust funds (*cf.* not-dedicated CU funds such as the Central Fund²⁶) are Lloyd's US Surplus-Lines CU TF, Lloyd's Credit-for-Reinsurance CU TF, Lloyd's US Surplus Lines PU TF, Lloyd's Credit-for-Reinsurance PU TF, LATF, EATF, and the various Illinois, Kentucky, Australian, South African, Asian,²⁷ Japanese and other self-limited funds. Such funds are mandated by local external insurance regulators (to whom it is a given that the Lloyd's enterprise must function as if it were a common enterprise) and do not affect the availability in principle of the Central Fund. A dedicated claims payment securitisation fund is always dedicated at both ends, *viz.*, it segregates contributions from only certain SYA participants to pay only certain assureds-at-Lloyd's, and as a rule of thumb should be presumed to do on the basis of currency.²⁸ In BBSN circumstances, the Lloyd's enterprise's BO funding of, and the assured's-at-Lloyd's MO recourse in relation to, a particular claim at Lloyd's is fund-specific. In order properly to perform Recourse Due Diligence™, familiarity with each relevant fund's governing instrument is essential, as is a thorough understanding of the distinction between PU and CU, dedicated and not-dedicated, and expressly and arguably available. The notion, promulgated by self-regulators-at-Lloyd's,²⁹ that there is an undifferentiated, homogenous pot of money at Lloyd's to pay claims is pernicious. The investigation should therefore examine not-BBSN recourse to: (1) specific relevant dedicated CU funds; (2) specific relevant not-dedicated CU funds; (3) specific relevant other funds (including local compensation funds³⁰); (4) each relevant *solus* — including ascertaining, where the *originalis* has been conventional outward-RTCed, which *solus* is relevant in the first place.

accessibility: the conduit effect

- 4.6** In BBSN circumstances, the (solvent or insolvent) SYA participant *originalis* is irrelevant to the assured-at-Lloyd's as a *solus* but quintessential as a conduit to certain expressly available and arguably available relevant MO and BO funds. The conduit effect is achieved wherever there is a relevant insurance contract with a SYA participant, whether with the *originalis* or (on some novation-by-custom

²⁵ See for example relevant deliberations at NAIC and NYID, partly reflected in *NAIC Review 1998*, *NAIC Review 1999*, *NAIC Review 2003*, *NYID Report 1995*, and see relevant NAIC meeting minutes, NYID annual reports, press releases, etc.

²⁶ Although CFUS 1 was, and CFUS 2 is, dedicated.

²⁷ See for example Lloyd's Asia (Singapore Policies) Instrument 2002 and Lloyd's Asia (Offshore Policies) Instrument 2002 attached to Mkt. Bn. Y2734 (February 21, 2002; 'Premiums trust deed/Lloyd's American Instrument [etc.]').

²⁸ Recalling Second Non-Life Directive, Annex 1 ('Matching rules').

²⁹ See for example the pseudo-homogenous table at Corporation RA fye December 31, 2003, p.52.

³⁰ A discussion of such funds is outside this Edition's scope. A summary of the FSA Compensation Scheme is given elsewhere in the present Chapter. In relation to relevant US products, see the characterisation at <http://www.lloyds.com/index.asp?itemid=2748> (February 2 17, 2004):-

Underwriters at Lloyd's are licensed only in Kentucky, Illinois and the US Virgin Islands, and are approved surplus lines insurers in all US jurisdictions except Kentucky and the US Virgin Islands. Lloyd's underwriters are also accredited reinsurers in all states. Insurance policies issued by underwriters are not protected or guaranteed by state insurance guaranty associations or insolvency funds, except in states where licensed.

theory³¹) a generation of conventionally inward-RTCing SYA participant. In the case of certain MO funds, all the assured-at-Lloyd's need do is present a 'Matured Claim' (or similar). The conduit effect is evident from the relevant governing instrument's requirement for the assured-at-Lloyd's to obtain a judgment (or, occasionally, an arbitration award) against a SYA participant.

the assured's-at-Lloyd's perspective: apparent common enterprise

- 4.7 It is usual to see popular assertions, with accompanying asseverations of abundant reserves and considerable general wealth,³² that "Lloyd's" is a "single licensed, regulated entity with a brand name and a system of financial security".³³ tending to reinforce the impression embedded among actual and prospective assureds-at-Lloyd's (as in "I am insured by Lloyd's") and external insurance regulators. The latter often use the word "Lloyd's" *simpliciter* as error for SYA participants, and often treat its components as if one³⁴ single enterprise for the purpose of (for example) some solvency tests and some CU claims securitisation devices.³⁵ More particularly, the notion often arises,³⁶ in various contexts and for various purposes,

³¹ Discussed at *Astor's Law of Lloyd's*, 2nd Ed.

³² See for example *Liberty Transp., Inc. v. Harry W. Gorst Co.* No. B045194 Court of Appeal of California, Second Appellate District, Division Seven 229 Cal. App. 3d 417; 1991 Cal. App. LEXIS 358; 280 Cal.Rptr. 159; 91 Cal. Daily Op. Service 2846; 91 Daily Journal DAR 4392 (1991) 229 Cal. App. 3d 417, 437: 'Appellants argue because the London based insurance companies were referred to as "London insurers" this created an improper inference appellants were associated with Lloyds of London and were therefore vastly more wealthy than respondent.'

³³ *Financial Times*, September 4, 2000, *Reinsurance* supplement, p.IV ("Victorian pipework to be replaced"), quoting the Corporation's then CEO:-

"There is one fundamental distinction between Lloyd's and the London company market. Lloyd's is a single licensed, regulated entity with a brand name and a system of financial security. The London company market is a collection of companies represented by a trade association. Therefore, there is a lot of difference."

Errors include: (1) the Corporation is not licensed to and never does sell insurance; (2) the Corporation is not synonymous with SYA participants; (3) SYA participants are not and cannot under any circumstances properly be described as a "single entity"; (4) apart from the Central Fund, no unfettered CU fund exists at Lloyd's to pay claims. And see for example *Security at Lloyd's 2000*, unnumbered page beginning "Security is of paramount importance" (italics added):-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation.

And see recently for example the terminological error at Corporation press release LL12/00, February 12, 2000 ("Lloyd's announces new representative in Australia"), p.2 ("Lloyd's has traded in Australia since early in the last century. ... The business written by Lloyd's is predominantly property ...") — the Corporation has never sold property or other insurance in Australia.

³⁴ See for example, apparently, Prudential Guidance Note 1994/4 (November 1994) ("Guidance notes for applicants to carry on business in the United Kingdom"), §51(c) ("No single reinsurer (apart from Lloyd's) ...").

³⁵ And see *Allen v Lloyd's*, Civil Action No. 3:96cv522, 1996 U.S. Dist. LEXIS 12300, *148 *et seq.*

³⁶ See for example *Luce v Lloyd's of London* 868 F.Supp. 625, 627 (D Vt. 1994); *Portavon Cinema Co Ltd v Price and Century Insurance Co. Ltd.* [1939] 4 All ER 601 (Branson J). And see *In the Matter of Lloyd's of London [etc.]* Pennsylvania Securities Commission, Administrative Proceeding Docket No. 9412-10, Summary Order to Cease and Desist, §1 (p.1):-

Lloyd's of London is a common enterprise consisting of the following entities and individuals: the Council of Lloyd's ..., also known as the Society of Lloyd's; the Corporation of Lloyd's...; Members' Agents, Managing Agents, Lloyd's brokers, and Lloyd's Names.

And see *In the Matter of the Offering of Securities by Lloyd's [etc.]*, Docket No. S-3073-I, Arizona Corporation Commission, Notice of Opportunity for Hearing [etc.], §13:-

As a result of the various ways "Lloyd's" was used, the Arizona Names reasonably understood that the Corporation of Lloyd's is a participant in all facets of the insurance business operating under the name "Lloyd's".

And see *Allen v Lloyd's of London*, Civil Action No. 3:96cv522 LEXIS 12300, *145 *et seq.*:-

that the Lloyd's enterprise's numerous disparate components are or amount to an homogenous (and wealthy³⁷) single entity³⁸ (sometimes imperfectly analogised to, for example, the New York Stock Exchange³⁹ or a club⁴⁰). *Security at Lloyd's 2001* is particularly clear as to every insurance contracts sold by every SYA participant to any assured-at-Lloyd's in any jurisdiction.⁴¹ So is *Security at Lloyd's 2001 (short)*.⁴²

In this case, sufficient indicia of interdependence between the players in the Lloyd's market has been established to make it reasonably likely that Names invested in the common entity of Lloyd's. ... [T]he "common enterprise" of Lloyd's is essential for Names to receive their paramount aim, a return on their investment. Names are attracted to Lloyd's because of its status and reputation. ... Lloyd's requires Names to "underwrite insurance at Lloyd's exclusively through one or more underwriting agents." ... Names depend on Managing Agents to select the risks underwritten through a syndicate, "set premium rates, receive premiums and pay claims to insureds on their behalf." ... And pursuant to the Lloyd's Bylaws, "The [managing] Agent undertakes to the Name that it will comply with the Lloyd's Acts 1871 to 1982 and with the requirements of the Council and will have regard to the codes of practice from time to time promulgated or made by the Council, which are applicable to it as a managing agent at Lloyd's." ... Finally, the viability of the Lloyd's market ultimately depends on the success of the syndicates. ... Even if Names' participation in Lloyd's does not evidence the interdependence required by *Howey*, plaintiffs have shown a reasonable likelihood of proving that the syndicates in which Names' participate constitute "common enterprises." According to Lloyd's own document, "The market is based upon the principle of risk spreading: each risk is underwritten by a number of syndicates each supported by individual and/or corporate members. The strength of Lloyd's policies lies in the levels of security provided by the Society's capital base — the resources of its members." (Hudson Aff. II, Exh. D). As such, underwriting risks "gain utility . . . only when cultivated and developed as component parts of a larger area." n45 The evidence, thus, demonstrates that the common enterprise of either Lloyd's, the syndicates, or both was essential to Names' aim of obtaining profits, measured by the amount that premiums exceed claims and costs. ... [B]ecause reinsuring to close pre-1993 liabilities depends upon the centralization and common management of Equitas, and because the rebate of premiums to Names will be based on Equitas' aggregate surplus reserves, plaintiffs have shown a reasonable likelihood of success in proving that Equitas is a "common enterprise." ... Lloyd's contends that Equitas is not a common enterprise because Names will not share in its profits or losses. Lloyd's also points out that Names have no right to the assets of Equitas and that Names remain severally liable. These facts, even if true, do not prevent a finding that horizontal commonality exists.

And see for example *Lloyd's: Re-establishing the Franchise, Managing the Risks* (Moody's Investors Service, October 1997), p.5 ("The financial distress that forced Lloyd's to restructured also caused collateral damage to a critical component of the market's historic success — the perception of Lloyd's, amongst its customers, as a single business enterprise offering a uniformly high level of financial security"). But see (correctly) *Travelers Indemnity Co. v Booker*, 657 F Supp. 280, 282 (DDC 1987): "Contrary to the popular conception, Lloyd's is not a monolithic institution, nor does it operate in the same manner as a corporation in this country".

³⁷ See for example *Liberty Transp., Inc. v Harry W. Gorst Co.* No. B045194 Court of Appeal of California, Second Appellate District, Division Seven 229 Cal. App. 3d 417; 1991 Cal. App. LEXIS 358; 280 Cal.Rptr. 159; 91 Cal. Daily Op. Service 2846; 91 Daily Journal DAR 4392 (1991) 229 Cal. App. 3d 417, 437:-

Appellants argue because the London based insurance companies were referred to as "London insurers" this created an improper inference appellants were associated with Lloyds of London and were therefore vastly more wealthy than respondent.

And see *Harvey-Latham Real Estate v Underwriters At Lloyd's, London*, 574 So. 2d 13 (Supreme Court of Mississippi 1990) 15 ("It is recognized by this Court that Lloyds of London is a corporate defendant of sizable wealth ...").

³⁸ See for example J M. Sylvester and R. D. Anderson, *Is It Still Possible to Litigate against Lloyd's in Federal Court?*, 34 Tort & Ins. L. J 1065, 1068 (1999) ("The Lloyd's enterprise is not an insurance company, but instead a self-regulating entity ...").

³⁹ See for example *Bonny v Lloyd's*, 3 F.3d 156, 158 n.2 (7th Cir. 1993), *cert. denied* 114 S. Ct. 1057 (1994); *Roby v Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 385 (1993). The notion is accurately rebutted at *Leslie v Lloyd's* 1995 U.S. Dist. LEXIS 15380, *14:-

The Court considers unpersuasive any characterization of Lloyd's as roughly similar to the New York Stock Exchange ..., because this analogy ignores dramatic differences between the two institutions.

⁴⁰ *Treasury Sel. Comm. 1*, §72 on self-regulatory quality at Lloyd's:-

[P]art of the problem at Lloyd's was that a 20th century insurance market was still regulated and run upon the lines of a private club, in which difficulties were hushed up and solved behind closed doors.

⁴¹ *Security at Lloyd's 2001*:-

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation. The reputation of Lloyd's for first class security is now

recognised by two leading independent international rating agencies, A.M. Best and Standard & Poor's, who rate us A– (Excellent) and A (Strong) respectively. These ratings reflect the strength of Lloyd's total resources of £18.6 billion. In addition all policies are backed by security where: All premiums received are held in trust for policyholders. These funds meet the majority of all claims. This forms the first link in Lloyd's chain of security. All members are required to hold additional capital at Lloyd's in case it is required to meet claims not fully met under the first link. This forms the second link. Members' other assets are also liable to meet claims, forming the third link. Finally, Lloyd's operates a central fund that is available to meet any portion of any claim that is not met from the first three sources. This constitutes the fourth link in Lloyd's chain of security. The capital position of Lloyd's remains excellent. The increased requirements on members in respect of their funds at Lloyd's has strengthened the total resources of the market.

Lloyd's operates a stringent system of solvency controls to ensure it meets its own high standards and those of the regulatory authorities. All members have an obligation to keep Lloyd's in funds to meet their underwriting liabilities. The annual solvency process requires the managing agent of each syndicate to estimate all current and future liabilities and to make financial provision for them. An actuary independently validates these estimates. Lloyd's unique system of security means that the total assets available to meet claims compare very favourably with conventional insurance companies and comparison is easier by the Lloyd's Security ratings from A.M. Best and Standard & Poor's. These ratings apply to all syndicates, regardless of their individual performance. Some rating agencies offer products that seek to rank individual syndicates according to performance. These syndicate-based measures are not a measure of security. Syndicates with a lower measure should not be excluded from receiving business on security grounds, as their ultimate security is equal to all others. Lloyd's regulatory management is very strong and independently minded and the lessons of the past have been well learned.

Members' premiums trust funds form the first link in the chain. This is where all the premium income and any additional reserves are held in trust for the benefit of policyholders. Monies are invested conservatively in order that they are available as soon as required. Other than paying claims, these funds can only be used to meet permitted expenses, for example, reinsurance premiums, underwriting expenses and to fund overseas regulatory deposits etc.

LIQUID ASSETS Link 1 — All premium receipts and reserves are held in premiums trust funds. Profits are only distributed when a year of account is closed, normally after three years. Members are unable to receive profits from the funds until the underwriting account has been closed, three years later, and all outstanding liabilities have been provided for. In case the resources in the premiums trust funds prove insufficient to meet obligations to policyholders, every member, both corporate and personal, is required to hold additional capital at Lloyd's. These are also held in trust for the protection of policyholders. To qualify for inclusion these assets must be readily realisable. They include cash securities, letters of credit, bank and other guarantees. Payment of claims takes precedence over distribution of profits[.]

READILY AVAILABLE RESOURCES Link 2 — Capital requirements determined for each member by Lloyd's risk-based capital methodology, subject to prescribed minimum levels. The amount of capital required is determined by the nature and quantity of risk the member underwrites. Those underwriting more volatile business are required to deposit larger funds.

Other assets owned by individual members of Lloyd's are also liable to meet claims on the policies they have underwritten, should the funds in the first two links prove insufficient. Individual members trade with unlimited liability and are liable to the full extent of their personal wealth. This is not shown in Lloyd's accounts, which record only the wealth that has been declared to Lloyd's. Capital amounts are reviewed annually for all members to reflect the risks underwritten[.]

ALL OTHER ASSETS Link 3 — Additional assets not necessarily held at Lloyd's but declared. Frequently members, both corporate and individual, have additional assets which are also liable to be required to meet claims. Individual members trade with unlimited liability. However, shareholders in corporate members have limited liability. Corporate members are liable to the extent of their resources. They are often the subsidiaries of leading insurance companies formed specially to participate in the Lloyd's market, whose reputation is at stake should substantial claims arise. Lloyd's has access to all of a member's other resources[.]

THE CENTRAL FUND Link 4 — The central fund is available in the event that a claim cannot be met from the premiums trust funds or members' assets. Resources available to the fund: £323 million in cash and conservative investments — £300 million from members from the premiums trust funds — £350 million from an insurance policy with six of the world's top insurers: Swiss Re, Employers Re, The St Paul Companies, Hannover Re, XL Mid Ocean Re and Chubb Corp.

The Central Fund is available to meet any portion of any member's liabilities that he is unable to meet in full. In addition to the £323m, the fund is now supported by a five year insurance programme with a limit of £350m in any one year. The Council is also able to call from members' premiums trust funds an up to £300m in any one year. The agreement with these companies runs for five years from 1 January 1999 and would come into effect should claims on the central fund exceed £100 million in any one year. It is subject to a maximum payment of £350 million in any one year and £500 million over the five-year period. The involvement of companies such as these testifies to the strength and reputation of the Lloyd's market. The central fund is available to back Lloyd's policies issued after 1993. Policies issued before that date have been reinsured by Equitas, an independent FSA authorised insurance company. Other assets of the Society of Lloyd's are also available to meet members' underwriting liabilities as a last resort. All figures correct as at 31 December 2000.

- 4.8 Asserting, in order to gain commercial advantage,⁴³ the existence and sufficiency of a "chain of security" of which the Central Fund is always a prominent part, they also alternately aver⁴⁴ and deny⁴⁵ that the Lloyd's enterprise is liable to remedy SYA

Clients can be confident that their claims will be met because Lloyd's has ample resources[.]

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- 42 *Security at Lloyd's 2001 (short):-*

Security is of paramount importance to all policyholders. The security of the Lloyd's market underpins its ability to pay claims and its worldwide reputation. The reputation of Lloyd's for first class security is now recognised by two leading independent international rating agencies, A.M. Best and Standard & Poor's, who rate us A- (Excellent) and A (Strong) respectively. These ratings reflect the strength of Lloyd's total resources of £18.6 billion. In addition all policies are backed by security where: All premiums received are held in trust for policy-holders. These funds meet the majority of all claims. This forms the first link in Lloyd's chain of security. All members are required to hold additional capital at Lloyd's in case it is required to meet claims not fully met under the first link. This forms the second link[.] Members' other assets are also liable to meet claims, forming the third link. Finally, Lloyd's operates a central fund that is available to meet any portion of any claim that is not met from the first three sources. This constitutes the fourth link in Lloyd's chain of security. Lloyd's web site disclaimer Lloyd's provides the materials contained on this site for general information purposes only. Lloyd's accepts no responsibility and shall not be liable for any loss which may arise from reliance upon the information provided. The information and services on this site are not intended for distribution to, or use by, any person or entity in any jurisdiction or country where such distribution or use would be contrary to local law or regulation.

- 43 *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (Bingham MR):-

One may imagine a party in (say) New York considering whether to place a risk with (say) a corporate insurer in Frankfurt or with Lloyd's in London. The New York party will no doubt be influenced by many considerations in making his choice, among them the terms of the cover and the assurance of payment if the risk materialises. It seems reasonable to suppose that his decision may also be influenced by the level of premium payable. If it is possible that Lloyd's underwriters have been able to attract business by offering lower premiums, in effect gambling on the chance that a risk will not materialise, in knowledge that, if all else fails, the Central Fund will be used to indemnify the assured, then that would in my view make it arguable that the existence and mode of operation of the Central Fund have had the effect of distorting competition within the common market.

- 44 See for example *SOD*, p.123-124:-

The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet any shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for these purposes.

This suggests, misleadingly, that that byelaw merely permits the discharge of an obligation. Note the meaningless use of "Society". And see for example *Report on Regulation 1999* ("Our task is to see that ... the Society has sufficient resources to meet its *obligations* in full"; italics added). And see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 201 (Cresswell J; "The purpose of security is to protect policyholders. Lloyd's has frequently publicly explained its chain of security and referred to the role of the Central Fund in it"). And see for example *Report on Regulation 1999* ("Our task is to see that ... the Society has sufficient resources to meet its *obligations* in full"; italics added).

- 45 See for example *SOD*, p.115:-

If Equitas were to fail to implement proportionate cover, the Society would be required to consider whether it wished to make good any shortfall or replenish the regulatory deposits which may have been used to meet policyholder claims. This might require the use of the New Central Fund following the prior approval of the members in general meeting.

And see similarly *ibid.*, 151:-

[T]he assets of the New Central Fund will belong to the Society and, unless and until the Council applies the assets of the New Central Fund ..., no member, policyholder or other person has any interest of any kind in them. ... The New Central Fund may not be applied directly to meet 1992 and prior liabilities reinsured to close into Equitas ... or to provide financial support to Equitas unless the prior sanction of members of the Society in general meeting has been obtained.

participants' defaults on insurance contracts. At the time of R&R, self-regulators-at-Lloyd's repeatedly referred to the Lloyd's enterprise as a "going concern"⁴⁶ without distinguishing between its component parts. Prospective assureds-at-Lloyd's are similarly⁴⁷ solicited,⁴⁸ without disclaimer,⁴⁹ using the familiar trademark "Lloyd's of London"⁵⁰ and phrases such as "Lloyd's policy" and "Lloyd's policyholder".⁵¹ The Lloyd's enterprise has represented, and carefully fostered the belief among its actual and potential customers, that it has never failed to pay 100% of a valid claim.⁵²

Cf. Transit Casualty Co., in Receivership v Certain Underwriters at Lloyd's, Cases CV595-2CC and CV596-4CC. circuit court Cole County, Missouri, Report and Recommendations of Special Master Dalton in each case, each dated July 23, 1998, Findings of fact, §7 in each case ('Those liabilities are owed "severally" by specific Names; they are not the liabilities of the Lloyd's marketplace as a whole. (Defendant's Exhibit 13; Tr. at 495.').

⁴⁶ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii ("if the Society were still a going concern"); *SOD*, p.135 ("If the Reconstruction and Renewal plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off").

⁴⁷ See *Industrial Guarantee Corporation v Lloyd's* (1924) 19 Lloyd's List Law Reports 78, 78 (Bailhache J), quoting a promotional pamphlet issued by self-regulators-at-Lloyd's to prospective assureds-at-Lloyd's, which stated in part:-

"It has justly been said that Lloyd's has solved the problem of combining individual energy, enterprise and initiative with the collective security of a corporate body. From this you will realize that Lloyd's is the largest insurance institution in the world."

See recently Corporation press release LL07/00, January 26, 2000 ("Lloyd's launches first ever advertising campaign"):-

The oldest name in insurance, Lloyd's of London, this week launches its first ever above-the-line advertising campaign. The London-based insurance market has initiated a six month campaign of print advertisements in UK and US financial and trade press While Lloyd's has advertised sporadically in the past, this move marks the first ever planned campaign by the market. ... Lloyd's specialises in high-risk and commercial insurance such as aircraft, shipping, political and war risks, e-commerce risks and personal accident. It is also the UK's largest motor insurer.

Note erroneous "It" in the last sentence. The Corporation does not sell motor or any other sort of insurance.

⁴⁸ See for example Lloyd's home insurance proposal form HIP(94):-

This is an application for insurance to be underwritten by certain Underwriters at Lloyd's of London. Lloyd's offers expertise: our tradition is to tailor and to innovate in order to meet our clients' needs. Lloyd's offers experience: virtually nothing is too large, too small, too complex, too simple or too new to cover Lloyd's offers security: 300 years of paying claims and a unique system of providing for future obligations makes the Lloyd's policy the safest that money can buy. Lloyd's Underwriters are leaders in the UK home insurance industry.

And see for example recent undated *Briefing Update* produced by the Corporation:-

Are you making a speech or presentation on Lloyd's? We may be able to help. Speaking opportunities at international / domestic conferences and other events provide an ideal platform to promote Lloyd's positively. Lloyd's marketing directorate can provide you with a full range of support including: Briefing notes and fact sheets Available on a range of topical issues. For further details please contact Timothy Yeardley: 0171 327 6079[.] ... Help us to help you[.] [L]et us know when you accept a speaking engagement[.] Contact Joanna Spicer: 0171 327 6256[.]

⁴⁹ *Cf.* the INEX's practice of including a disclaimer.

⁵⁰ See for example *Financial Times*, September 4, 2000, *Reinsurance* supplement, (advertisement for "Lloyd's"):-

123 underwriting syndicates operate at Lloyd's of London. Within these distinct units, specialist expertise and entrepreneurial flair combine to deliver rapid solutions tailored to business needs. Together, the syndicates form a dynamic market that is a major power in world insurance. 75% of FTSE 100 companies and 64% of those in the Fortune Global 500 buy insurance at Lloyd's.

⁵¹ See for example Byelaw 7 of 1998, Sch. 2, §4(1).

⁵² See for example *Gillespie v. Federal Compress & Warehouse Co.* Court of Appeals of Tennessee, Western Division, at Jackson 37 Tenn. App. 476; 265 S.W.2d 21; 1953 Tenn. App. LEXIS 103 (1953). 491: 'The policy is executed in the usual manner of all Lloyd's policies, covering in this Country billions of dollars of insurance and reinsurance. The evidence shows that the two large groups of American companies which engage in this field of cotton insurance are reinsured in Lloyd's, as well as the fact that

Other relevant factors in considering liability at Lloyd's beyond the relevant SYA participant include (for example) the irrelevance of any particular SYA participant to the handling and paying of a claim, the individual SYA participant's necessarily limited assets and multiple compound exposures, and the interchangeability of particular SYA participants in relation to insurance liabilities conventionally RTCed (indeed, the abandon with which such liabilities appear to be novated-by-usage). Credit rating agencies presently rate the Lloyd's enterprise as if it were one entity.

SOME PARTICULAR FUNDS

scope of section

- 4.9** This section considers a limited number of aspects of certain selected funds principally to introduce certain key concepts such as insufficiency and the assured's-at-Lloyd's access rights. The funds are discussed, legally and practically, in more detail elsewhere.⁵³

PTF-premium

orientation

- 4.10** PTD (general) 2002 is (with PTD (short-term life) 2002) the principal originating trust fund for the SYA participant's insurance business. Formerly in a form required to be approved by the Secretary of State,⁵⁴ it must now be in a form approved by the Corporation.⁵⁵

trust funds

- 4.11** The FSA requirement⁵⁶ speaks of a PTD receptacle for 'all amounts received or receivable' by the "member".⁵⁷ statutory requirement is confined to premium.⁵⁸ The form of PTD approved by the Treasury is much wider. PTD (general) 2002 — which must be distinguished from provisions of prior PTDs, the subject of extensive litigation⁵⁹ — requires that trust fund assets include, broadly speaking:⁶⁰

Lloyd's coverage is considered the best in the world; that Lloyd's has been in business since the year before the Revolution of 1688 and has never failed to pay a legitimate claim.'

⁵³ See *Astor's Law of Lloyd's*, 2nd Ed. in which the principal funds' cash flow, accounting, use, replenishing and general administration are demonstrated.

⁵⁴ See now obsolete Insurance Companies Act 1982, s.83(2).

⁵⁵ LLD, §10.3.1R, presumably error for the Council since the Corporation has no primary self-regulatory functions. The designation of the Corporation is not even a correct way for the FSA to position itself under FSMA 2000, s.314(1)(a) (which, correctly, mentions the Council, not the Corporation).

⁵⁶ See generally LLD, §10.3.1R.

⁵⁷ Insurance Companies Act 1982, 83(2) was expressly confined to premium but the deed's capture provisions were always much wider, and were appropriately amended following *Napier and Ettrick v R. F. Kershaw Ltd.* {1c and 2c} [1999] 1 WLR 756 (HL), and see previously *ibid.*, {1b and 2b} [1997] LRLR 1 (CA). See now for example PTD (general) 2002, Sch. 2 ('The trust fund').

⁵⁸ Insurance Companies Act 1982, s.83(2):-

Every underwriter shall in accordance with the provisions of a trust deed approved by the Treasury, carry to a trust fund all premiums received by him or on his behalf in respect of any insurance business.

⁵⁹ See for example *Napier and Ettrick v R. F. Kershaw Ltd.* {1c and 2c} [1999] 1 WLR 756 (HL; Lord Steyn), holding that under a former version of the PTD, §2(a)(i), damages for negligent active underwriting were included (*ibid.*, 763); PSL recoveries and damages for negligent PSL advice were not included (*ibid.*, 764) and damages for negligent portfolio selection advice were not included (*ibid.*, 765). Damages for negligent active underwriting were distinct from damages for negligent advice concerning portfolio selection and concerning PSL: *ibid.*, 765. Lord Steyn found the old PTD, §2(a)(i) words "in connection with" "vague": *ibid.*, 764; see similarly *Napier and Ettrick v R. F. Kershaw Ltd.* {1b and 2b} [1997] LRLR 1, 6 (Nourse LJ).

⁶⁰ For the full list, see PTD (general) 2002, §2 and *ibid.*, Sch. 2.

(1) all premiums, reinsurance recoveries, rights of salvage and subrogation, and all other assets connected with the "Underwriting";⁶¹ (2) virtually⁶² every litigation recovery — whether against the Corporation or any members' or managing agency or such agency's professional or other advisers, Lloyd's broker, syndicate auditor, syndicate "professional" (not defined), or other adviser, and including settlement monies and "any" relevant action group distribution⁶³ — by the Member in relation to his Lloyd's affairs.⁶⁴ Awards by the Lloyd's Members' Ombudsman are not captured;⁶⁵ (3) PSL and EPP recoveries;⁶⁶ (4) "Auction Proceeds"⁶⁷ (as defined⁶⁸); (5) trust fund income. Trust fund income generally accrues to the trust fund,⁶⁹ except that income arising from the Member's Personal Reserve Sub-Fund may in the Regulating Trustee's discretion be paid to the Member absolutely,⁷⁰ while surplus income arising after the Member's death automatically accrues to him absolutely;⁷¹ (6) various other things.⁷² There are detailed provisions concerning rights of recovery against the SYA participant. There are detailed provisions concerning rights of recovery against the SYA participant complementing those in SUA 1 / SCA 1.⁷³

assured's-at-Lloyd's rights

- 4.12** Any recourse directly against a SYA participant's PU PTF-premium, the font of contributions to the other funds ('Overseas Directions'), will be of paramount concern to the assured-at-Lloyd's in not-BBSN circumstances. PTD (general) 2002 expressly⁷⁴ addresses the possibility that an assured-at-Lloyd's will wish to claim against the fund in relation to the discrete liability of one particular SYA participant — and being a PU trust fund (*cf.* a CU fund) he would have to claim against the PTFs of each subscribing SYA participant. The deed provides that no assured-at-Lloyd's shall have any right to an account of any PTF's capital, income or administration until all four following conditions have been fulfilled) (similar conceptually to conditions in other funds): (1) a judgment has been obtained by the assured-at-Lloyd's or such other person as aforesaid against the SYA participant ('Member') in respect of the latter's liability under the relevant policy or contract of insurance in a court of competent jurisdiction, either in England or any other

⁶¹ PTD (general) 2002, Sch. 2, §1(i)(A), (B), (C) and (H).

⁶² PTD (general) 2002, Sch. 2, §1(i)(D) excludes an "excluded compensation award" (not defined) and the Member's "disbursements" (not defined) unless already disbursed by the trust fund.

⁶³ PTD (general) 2002, Sch. 2, §1(i)(D).

⁶⁴ PTD (general) 2002, Sch. 2, §1(i)(D). This provision particularly covers recoveries in relation to actionable underwriting (*ibid.*, §(1)) and actionable portfolio selection (*ibid.*, §(2)). The judgment creditor hopes that such recoveries — which under the provision are never the Member's to enjoy directly until his relevant liabilities have been discharged — will be sufficient to fully discharge them. Whether they are or not is a matter for the court.

⁶⁵ PTD (general) 2002, Sch. 2, §1(i)(D).

⁶⁶ PTD (general) 2002, Sch. 2, §1(i)(E).

⁶⁷ PTD (general) 2002, Sch. 2, §1(i)(F).

⁶⁸ See definition at PTD (general) 2002, Sch. 1, §1.

⁶⁹ PTD (general) 2002, §16.

⁷⁰ PTD (general) 2002, §16(b).

⁷¹ PTD (general) 2002, §16(a); *q.v.* for the precise provisions.

⁷² See PTD (general) 2002, Sch. 2, §1(G) (all Rights of Recovery); *ibid.*, §1(iii) (income); *ibid.*, §1(iv) (accretions); *ibid.*, §1(v) substitutions; and see *ibid.*, §1(ii).

⁷³ See *Astor's Law of Lloyd's*, 2nd Ed.

⁷⁴ PTD (general) 2002, §31.

country where the judgment is enforceable in England after registration or extension without obtaining a judgment of a court in England other than an order for enforcement of the judgment); (2) that judgment has become final in the sense that the particular litigation has been concluded either through failure to appeal within the time permitted for an appeal or through the final disposition of any appeal or appeals that may be taken; (3) there has been delivered to the 'Managing Agent' an office or official copy of that judgment together with such proof of its finality and subsistence as the 'Managing Agent' 'requires'; and (4) forty-two days have expired from and after the date of that delivery without the judgment having been satisfied.⁷⁵

amount; sufficiency

- 4.13** The view is misguided that any form of PTF-premium is a "guarantee"⁷⁶ that the SYA participant will be able to pay his insurance liabilities in full. No "policyholder or other person having or alleging any claim or demand against the Member"⁷⁷ is entitled to an account of the trust fund, its income, administration or execution, or to see any books, papers or records of any of the trustees unless and until all the following four conditions have been satisfied: (1) the policyholder or other person has obtained a judgment⁷⁸ in respect of the Member's liability under an insurance contract from a court of competent jurisdiction in England or any other country whose judgments are enforceable in England without a substantive English judgment;⁷⁹ (2) that judgment has become final;⁸⁰ (3) a copy has been delivered to the managing agency with such proof of its finality as it may require;⁸¹ (4) forty-two days have elapsed from the date of delivery without the judgment being satisfied.⁸²

insolvency provisions

- 4.14** PTD (general) 2002⁸³ provides that a 'notifiable event'⁸⁴ includes the making of a receiving order in bankruptcy against a 'Managing Agent's Trustee' (natural person) by the due process of law of any country, or him making or proposing any composition with his creditors or otherwise acknowledging his insolvency.⁸⁵ There are equivalent provisions if the trustee is incorporated.⁸⁶ Such provisions relate to insolvency at or in relation to a managing agency and are dealt with in this work's Second Edition. There are express⁸⁷ provisions concerning the insolvency of a coverholder (*ditto*).

⁷⁵ PTD (general) 2002, §31.

⁷⁶ *Napier and Ettrick v R. F. Kershaw Ltd.* {1c and 2c} [1999] 1 WLR 756, 766 (Lord Steyn: the PTD in issue "is a means of creating a form of security in favour of policyholders. It provides a guarantee that a Name will be able to meet his liabilities ...").

⁷⁷ PTD (general) 2002, §31.

⁷⁸ PTD (general) 2002, §31(a)-(d). An arbitration award is not mentioned.

⁷⁹ PTD (general) 2002, §31(a).

⁸⁰ PTD (general) 2002, §31(b).

⁸¹ PTD (general) 2002, §31(c).

⁸² PTD (general) 2002, §31(d).

⁸³ See similarly Lloyd's American Instrument 1995, Sch. 1, definition of 'notifiable event'.

⁸⁴ See generally PTD (general) 2002, §6(b)(vii).

⁸⁵ PTD (general) 2002, Sch. 1, definition of 'notifiable event', §(i)(a).

⁸⁶ See PTD (general) 2002, Sch. 1, definition of 'notifiable event', §(ii).

⁸⁷ See for example PTD (general) 2002, §10(b); PTD (short-term life) 2002, §10(b). See similarly Lloyd's American Instrument 1995, §10(b).

CFUS 2**generally**

- 4.15 The following is a summary orientation to CFUS 2, discussed in detail elsewhere.⁸⁸ CFUS 2 (*cf.* CFUS 1⁸⁹) was provided by self-regulators-at-Lloyd' when NYID realised that CFUS 1 was insufficient.⁹⁰

securitised business

- 4.16 CFUS 2 is intended to securitise "American business" as defined in LATD, July 11, 1995 as amended:⁹¹ it 'shall enure for the benefit of and serve as security against liabilities to all policy holders to whom underwriters at Lloyd's are liable in respect of their American business.'⁹² Similar business is securitised by funds governed by (for example) LATD, Lloyd's US Surplus-Lines PU and CU TDs, Lloyd's US Credit-for-Reinsurance PU and CU TDs, and EATD.

trust property

- 4.17 The trust property comprises (as to principal) transfers from Principal Central Fund⁹³ and all other assets transferred from time to time to the CFUS (Number 2) Trustee (Citibank⁹⁴) to be held under CFUS (Number 2) trusts⁹⁵ plus money and investments representing the same,⁹⁶ and (as to income) transfer to Central Fund US TD 2 principal or to Principal Central Fund as the Council directs.⁹⁷ The trust fund⁹⁸ continues to form part of the Central Fund⁹⁹ (see the distinction between "Principal Central Fund" and the larger "Central Fund"; Central Fund US TD 2 trust fund is part of the latter).

⁸⁸ At Astor's *Law of Lloyd's*, 2nd Ed.

⁸⁹ See *NYID Report 1995*, p.15:-

CFUS was established in July 1992 in the amount of \$700,061,719 by means of a special levy by Lloyd's against Names. This amount was transferred from LATF to CFUS and represented a portion of Names' underwriting profits on closed years of account held in LATF.

⁹⁰ See generally *NYID Report 1995*. Historically, see for example March 25, 1996 declaration of Brian K. Atchinson, NAIC's then president, filed in the Richards litigation, March 1996, p.6:-

I am informed by the New York Insurance department that the Lloyd's Trusted Surplus Statement of December 31, 1995, for business prior to August 1, 1995, showed trust assets of \$12,965,460,983, liabilities of \$19,799,066,763 and a negative trust surplus of \$6,106,682,835. Based upon this statement, and the New York Insurance Department's examination of Lloyd's as of December 31, 1993, there is no surplus in the joint asset trust funds. ... The New York Insurance Department's examination of Lloyd's as of December 31, 1993 determined that assets in the LATF were less than Lloyd's outstanding U.S. liabilities, and therefore not in compliance with the laws in most [US] states. To remedy the deficiency, Lloyd's agreed to take the following steps: (a) It established Lloyd's Central Fund United States Trust Fund (Number 2) by transferring \$500 million from its Central Fund in London; (b) on a going forward basis, it created separate trust funds for reinsurance and excess [aka surplus] lines, by syndicate, funded at a level equal to each syndicate's gross U.S. liabilities; (c) Lloyd's proposed establishment of a reinsurance company under the laws of the United Kingdom, to be known as Equitas, which will assume the U.S. liabilities of the Lloyd's Names on 1992 and prior policies.

⁹¹ Central Fund US TD 2, §First, (A), and see *ibid.*, §(F).

⁹² Central Fund US TD 2, §Sixth, §(A).

⁹³ Central Fund US TD 2, §Second, §(i).

⁹⁴ Central Fund US TD 2, recital, first unnumbered §. There are typical conflict-of-interest provisions: see *ibid.*, §Eighth, §(H).

⁹⁵ Central Fund US TD 2, §Second, §(ii).

⁹⁶ Central Fund US TD 2, §Second, §(iii).

⁹⁷ Central Fund US TD 2, §Third.

⁹⁸ Central Fund US TD 2, §First, §(B).

⁹⁹ Central Fund US TD 2, recital, first unnumbered § ("moneys transferred from the Principal Central fund as hereinafter defined, which moneys form and will continue to form part of the Central Fund").

trusts

- 4.18** The principal trusts are: (1) making good any default by any "underwriter of Lloyd's"¹⁰⁰ under any contract of insurance underwritten at Lloyd's forming part of his 'American business';¹⁰¹ (2) preventing the occurrence or reducing the extent of such default by any "underwriters of Lloyd's";¹⁰² (3) compensating wholly or partly any person, including the Corporation, for making for or on behalf of any "underwriter of Lloyd's" any payment which has the effect of preventing or reducing such default;¹⁰³ (4) extinguishing or reducing the liability of any "underwriter of Lloyd's" in connection with his 'American business' to any person whatsoever whether or not arising under a contract of insurance.¹⁰⁴ CFUS 2 lasts (after a minimum period of six years) for twenty years or until the meeting of an express condition that, based on amounts certified of reported in the then most recent relevant annual statement to NYID, LATF assets exceed the amount required to be held.¹⁰⁵ The Council has express power to revoke the trust but only if it satisfied that all liabilities, 'both actual and estimated', of relevant SYA participant have been met or provided for without taking into account CFUS 2 money.¹⁰⁶ To the extent that such revocation is an amendment, NYID's consent is required.¹⁰⁷

access and insolvency

- 4.19** No policyholder is entitled at any time to charge CFUS 2 directly with any claim.¹⁰⁸ Even after his claim becomes enforceable against the fund, he is not entitled to any account or otherwise to inquire into the administration, of the fund.¹⁰⁹ His 'sole right' is to require transfer of money from CFUS 2 to the relevant LATFs.¹¹⁰ Access to the fund is by way of transfer to the LATF of "any underwriter of Lloyd's against whom a judgment has been obtained by a policy holder" on satisfaction of four typical conditions.¹¹¹ No assured-at-Lloyd's has any express statutory or contractual right to any Central Fund¹¹² money: no "policyholder or other person" has a right to

¹⁰⁰ Central Fund US TD 2, §Fourth, (A)(i). Central Fund US TD 2 uses "underwriter of Lloyd's" persistently, presumably intending "underwriter at Lloyd's" (see for example *ibid.*, §First, (H), definition of "Name" and *ibid.*, erroneous 'sometimes, herein, referred to as an "underwriter at Lloyd's". References to the "Central Fund" are to the Byelaw 4 of 1986 Central Fund as from time to time amended or re-enacted: Central Fund US TD 2, §First, (D).

¹⁰¹ Central Fund US TD 2, §Fourth, (A)(i).

¹⁰² Central Fund US TD 2, §Fourth, (A)(ii).

¹⁰³ Central Fund US TD 2, §Fourth, (A)(iii).

¹⁰⁴ Central Fund US TD 2, §Fourth, (A)(iv).

¹⁰⁵ Central Fund US TD 2, §Seventh.

¹⁰⁶ Central Fund US TD 2, §Twelfth; *q.v.* for detailed provisions.

¹⁰⁷ Central Fund US TD 2, §Twelfth: 'No amendment of the CFUS Trust Deed (Number 2) shall become effective without the prior written consent of the Superintendent of Insurance of the State of New York', which is otherwise a *non sequitur* in the context.

¹⁰⁸ Central Fund US TD 2, §Sixth, §(A).

¹⁰⁹ Central Fund US TD 2, §Sixth, §(A).

¹¹⁰ Central Fund US TD 2, §Sixth, §(A).

¹¹¹ Central Fund US TD 2, §Sixth, (B). The conditions are at *ibid.*, (i)-(iv), *viz.*, the policyholder has obtained a judgment from a court of competent jurisdiction in the US against the underwriter in respect of the underwriter's liability under a policy forming part of his American business; (ii) the judgment has become final; (iii) a certified copy of the judgment has been filed with the CFUS (number 2) Trustee; (iv) thirty days have then passed without such judgment having been satisfied. Access to money in Lloyd's US Surplus-Lines CU TF and Lloyd's US Credit-for-Reinsurance CU TF, and LATF, among others, is on similar lines.

¹¹² Byelaw 4 of 1986, §9(1)

payment from the Central Fund, or to any account of its management, investment or application.¹¹³ Unlike other instruments,¹¹⁴ the CFUS 2 trust deed does not provide for insolvency, insufficiency, inadequacy, or seizure by NYID.

LATF (general)

trusts and beneficial interests

- 4.20** LATD (general) 1999 provides that LATD (general) 1999 trust fund principal is to be held in trust principally for the following purposes (among others¹¹⁵): (1) to pay "any" losses, claims, premium refunds, outward reinsurance and other "outgoings" (not defined) "in connection with the American business";¹¹⁶ (2) to pay a wide variety of "expenses",¹¹⁷ apparently extending to those incurred other than in connection with the "American business";¹¹⁸ (3) to pay the costs of any surety or other bonding arrangements required in connection with claims litigation;¹¹⁹ (4) to make transfers of cash and other property out of and into accounts and sub-accounts of the LATD trust fund as required for a variety of external regulatory, self-regulatory and or claims securitisation purposes;¹²⁰ (5) to make transfers of funds surplus to LATD (general) 1999 requirements to the relevant PTD (general) 2002 trust fund[s],¹²¹ if so requested by the Agent,¹²² whether annually in the case of an annual solvency test surplus (as set out in relevant Council Requirements and Directions),¹²³ or at any other time with the approval of the NYID and the Council.¹²⁴ In either case, the surplus must be certified or reported by "auditors approved by Lloyd's".¹²⁵ Subject to the LATD (general) 1999's trusts, the trust fund is held during the Trust Term (as defined¹²⁶) on trust for the Name, his executors,

¹¹³ Byelaw 23 of 1996, §7(5).

¹¹⁴ For example Lloyd's US Surplus-Lines CU TD, and Lloyd's Credit-for-Reinsurance CU TD.

¹¹⁵ See LATD (general) 1999, §4 for full detailed provisions.

¹¹⁶ LATD (general) 1999, §4.1(A). Presumably "solely in connection with the American business".

¹¹⁷ See the detailed provisions at LATD (general) 1999, §4.1(B)(i)-(iii)(a) and (v). The expenses there listed are, respectively, broadly: (1) remuneration and proper expenses of the American Trustee — see *ibid.*, §13 for detailed provisions; (2) any salary, commission or other remuneration payable to the Agent or any other person in connection with conducting or winding up the American business; (3) the proportion, attributable to the American business and payable by the Name, of any salary, commission or other remuneration payable in connection with conducting or winding up any of the Name's underwriting business; (4) "other expenses in connection with the management and investment of the Lloyd's American Trust Fund hereunder".

¹¹⁸ See LATD (general) 1999, §4.1(B)(iii)(b) ("any expenses whatsoever from time to time incurred in connection with any underwriting business of the Name"). This provides yet another source for the payment of general expenses: for other sources but there should be no risk of overpayment because, logically, a particular expense cannot be paid more than once.

¹¹⁹ LATD (general) 1999, §4.1(B)(iv).

¹²⁰ See the detailed provisions at LATD (general) 1999, §4.1(C)(i)-(iv).

¹²¹ LATD (general) 1999, §4.1(D) and (E). See *ibid.*, §1.20, definition of "Premiums Trust Deed" ("the Lloyd's Premiums Trust Deed ... executed by the Name in respect of insurance business at Lloyd's other than long term business"). And see *ibid.*, §1.21, definition of "Premiums Trust Fund" ("the property held in trust subject to the provisions of the Name's Premiums Trust Deed").

¹²² LATD (general) 1999, §4.1(D) and (E).

¹²³ LATD (general) 1999, §4.1(D); *q.v.* for detailed provisions.

¹²⁴ LATD (general) 1999, §4.1(E); *q.v.* for detailed provisions.

¹²⁵ LATD (general) 1999, §4.1(D) and (E)..

¹²⁶ See the detailed definition at LATD (general) 1999, §1.29.

administrators, successors or assigns,¹²⁷ to whom the fund assets must be distributed when the Trust Term expires.¹²⁸

assured's-at-Lloyd's rights against the trust fund

4.21

The assured-at-Lloyd's must distinguish between the trusts of the LATF and his entirely separate and distinct right to access it directly. LATD (general) 1999, which "shall enure for the benefit of all Policyholders",¹²⁹ provides that a Policyholder's claim becomes enforceable against the LATD 1999 trust fund when all the following conditions have been satisfied: (1) a final¹³⁰ judgment has been obtained by the Policyholder from a court of competent jurisdiction within the United States against the Name, *or* against the "Syndicate" (as defined) through which the Name underwrites, in respect of the Name's liability under "a policy",¹³¹ (2) a certified copy of the judgment, together with such proof of its finality as the American Trustee shall require, has been "filed" with the American Trustee;¹³² (3) thirty days have expired from the date of the filing without the American Trustee having received notice from the Council that the judgment has been satisfied.¹³³ There then follow various additional procedural steps, such as (for example¹³⁴): (a) the American Trustee must then "promptly" notify the Agent, the Council and the grantor and, within fifteen days of those thirty days, advise them whether in its opinion the conditions have been met;¹³⁵ (b) the Council advises the American Trustee, the Agent and the grantor within ten days of the thirty days whether the judgment is in respect of American business and the SYAs to which it relates (including, by implication, whether it includes 1992 and Prior Business), and the proportions borne by each SYA if more than one;¹³⁶ (c) if the trust fund is insufficient to pay the judgment in full, the American Trustee must notify the Superintendent of Insurance of the State of New York, who must thereupon determine whether the judgment actually relates, rather, to liability in respect of American business's 1992 and Prior Business.¹³⁷

inadequacy of trust fund assets: generally and Equitas Re

4.22

The LATD (general) 1999 trust fund is deemed inadequate if either: (1) the DTI has ordered the Lloyd's market to cease trading;¹³⁸ (2) Equitas Re invokes the proportionate payment plan,¹³⁹ proportionate payment on claims arising from American business is less than 100%¹⁴⁰ and the Policyholder's claim has not been

¹²⁷ LATD (general) 1999, §6.1.

¹²⁸ LATD (general) 1999, §6.2.

¹²⁹ LATD (general) 1999, §5.1..

¹³⁰ LATD (general) 1999, §5.2(B); *q.v.* for detailed provisions.

¹³¹ LATD (general) 1999, §5.2(A). "Policy" is not defined; but a *relevant* policy is meant: see the definition of "Name" at *ibid.*, §1.16 etc.

¹³² LATD (general) 1999, §5.2(C).

¹³³ LATD (general) 1999, §5.2(D).

¹³⁴ See the full provisions at LATD (general) 1999, §5.3.

¹³⁵ LATD (general) 1999, §5.3.

¹³⁶ LATD (general) 1999, §5.3. If the Council does not so advise, the judgment is then deemed to relate to American business exclusively attributable to (indeterminate) SYAs budding in the 1993, 1994, 1995 or later UYs: *ibid.*

¹³⁷ LATD (general) 1999, §5.3

¹³⁸ LATD (general) 1999, §18.1(a).

¹³⁹ LATD (general) 1999, §18.1(b)(i).

¹⁴⁰ LATD (general) 1999, §18.1(b)(ii).

satisfied within one hundred and twenty days of the thirty day standard waiting period.¹⁴¹ On receiving notice from the DTI or Equitas Re, as appropriate, the American Trustee must immediately notify the Superintendent of Insurance of the State of New York in writing,¹⁴² who then has grounds to obtain a court order directing the American Trustee to transfer all trust assets — except those over which it has a lien under LATD (general) 1999 — to the Superintendent,¹⁴³ to be applied under New York law relating to the conservation of insurance companies.¹⁴⁴ That transfer is not automatic.

Lloyd's American Instrument 1995

generally; parties

- 4.23** Each corporate Member is automatically bound by, but does not enter into, the standard-form, uniform, non-negotiable Lloyd's American Instrument 1995. Each corporate Member has *one* Lloyd's American Instrument 1995 trust fund for each relevant SYA on which it participates. There are therefore potentially tens of thousands of separate, current Lloyd's American Instrument 1995 trust funds. Any one relevant managing agency might preside over thousands of such trust funds. The instrument, which has no parties, is misleadingly called a deed.¹⁴⁵

purpose and applicability

- 4.24** The Lloyd's American Instrument 1995's broad¹⁴⁶ purpose¹⁴⁷ is to sequester premium and other relevant assets in one "Dollar Trust Fund" (as defined;¹⁴⁸ in this book, "Lloyd's American Instrument 1995 Fund") per individual relevant corporate SYA participant, so as to securitise, separately and distinctly from his PTD (general) 2002 trust funds,¹⁴⁹ payment of claims to "policyholders" arising under "American Conditions"¹⁵⁰ business but which — with three exceptions — do *not*

¹⁴¹ LATD (general) 1999, §18.(b)(iii). On the standard waiting period, see *ibid.*, §5.2(D).

¹⁴² LATD (general) 1999, §18.2.

¹⁴³ LATD (general) 1999, §18.3, mentioning New York Insurance Law, Article 74.

¹⁴⁴ LATD (general) 1999, §18.4. Any surplus assets are then transferred back to the American Trustee to pay the latter's remuneration (on which see *ibid.*, §13), and any surplus thereafter must be transferred by the American trustee to the Name's PTF: *ibid.*

¹⁴⁵ See Lloyd's American Instrument 1995, *passim*. It has no parties. The Corporation's seal is affixed to it for no obvious reason.

¹⁴⁶ See Lloyd's American Instrument 1995, recital (D) for a fuller account.

¹⁴⁷ And see Lloyd's American Instrument 1995, recital (E):-

The purpose of [Lloyd's American Instrument 1995] is to deal with (and where applicable to replace the [LATD] as regards) that part of the Corporate Member's general business complying with the American Conditions (and that part of its Lloyd's American Trust Fund) which due to such last recited amendments to the [LATD] has now been excluded from the [LATD][.]

¹⁴⁸ The Dollar Trust Fund is described in Lloyd's American Instrument 1995, §3. *Per ibid.*, §1(a)(xii), "Dollar Trust Fund" means:-

the Dollar Trust Fund hereby constituted as provided by clause 3 of this Deed (including any part of the Corporate Member's Lloyd's American Trust Fund that is excluded from the [LATD] having regard to the amendments thereto hereinbefore recited)[.]

¹⁴⁹ See for example Lloyd's American Instrument 1995, §2(a), recording that the Dollar Trust Fund (on which see *ibid.*, §3):-

should ... be held (as a separate and distinct Fund) upon and with and subject to the trusts powers and provisions in this Deed declared and contained in respect of the same (and accordingly should not form part of the PTD Trust Fund held on the trusts of the Corporate Member's PTD)[.]

¹⁵⁰ *Per* Lloyd's American Instrument 1995, recital (A), "American Conditions" means, broadly, general business where: (1) liability is expressed in US dollars; and (2) the premium is paid or payable in US dollars. *Q.v.* for full definition.

arise from insurance or reinsurance contracts or policies underwritten or incepting on or after August 1, 1995.¹⁵¹ The three exceptions are: (1) "American Conditions" contracts or policies written under binders incepting before August 1, 1995;¹⁵² (2) "American Conditions" insurance contracts or policies written further to the Kentucky licence before January 1, 1996;¹⁵³ (3) various RTC contracts in relation to "American Conditions" business.¹⁵⁴ The Lloyd's American Instrument 1995 is therefore the counterpart, in relation to certain relevant business written on and after August 1, 1995, to the LATD (general) 1999 (which deals with certain relevant business written before August 1, 1995).

regulatory aspects

- 4.25** Lloyd's American Instrument 1995 — a recent consolidation of separate substantially identical instruments for natural and corporate SYA participants — has¹⁵⁵ the status of an Overseas Direction for purposes of PTD corporate general 1999: it should be read with, and be considered a variation of, PTD (general) 2002 and LATD, to which it is expressed to be supplemental¹⁵⁶ and with which it shares numerous definitions.¹⁵⁷ It is one of the rare instruments at Lloyd's which — solely to enable each relevant Member's compliance with relevant US premium securitisation rules — diverts, away from each relevant Member's relevant PTF to *another* securitisation fund, *viz.*, the Lloyd's American Instrument 1995 Fund, premium and other relevant money which otherwise¹⁵⁸ would be required to accrue solely to that particular PTF.

what is in a particular Instrument Fund?

- 4.26** Each relevant Member's Lloyd's American Instrument 1995 Fund comprises, broadly:¹⁵⁹ (1) premiums and other monies (excluding so-called "Specified Excluded Assets"¹⁶⁰) in relation to "New American Business" (as defined¹⁶¹) and the

¹⁵¹ See generally Lloyd's American Instrument 1995, recital (D).

¹⁵² Lloyd's American Instrument 1995, recital (D)(1).

¹⁵³ Lloyd's American Instrument 1995, recital (D)(2).

¹⁵⁴ Lloyd's American Instrument 1995, recital (D)(3). The RTC contracts exceptionally included are, broadly, where both: (1) the RTC premium is paid or is payable in US dollars, or the inward-RTCing SYA participant's liability "in respect of" liabilities arising under the RTC contract is expressed in US dollars: *ibid.*, recital (D)(3)(i); and (2) that RTC contract RTCs insurance or reinsurance sold by outward-RTCd SYA participants incepting before August 1, 1995 or were written under a binder incepting before that date or written further to the Kentucky licence before January 1, 1996.

¹⁵⁵ Lloyd's American Instrument 1995, header § ("This Overseas Direction"); *ibid.*, §2(c) *ibid.*, accompanying February 3, 1999 deed of amendment and direction, recital (B) ("The 1995 American Instrument (Corporate Members) is an Overseas Direction and Special Trust Direction").

¹⁵⁶ Lloyd's American Instrument 1995, header §.

¹⁵⁷ See for example Lloyd's American Instrument 1995, §1(a).

¹⁵⁸ And see for example Lloyd's American Instrument 1995, §3(a)(i): the Lloyd's American Instrument 1995 Fund comprises (among other things) "all premiums and other monies ... being premiums and other monies which but for this Deed would otherwise be or become comprised in the PTD Trust Fund ...". And see for example Lloyd's American Instrument 1995, recital (C), reciting that the Council has power under PTD (corporate general) 1999, §4 or §5, with the Treasury's [or its delegate's] approval, to:-

give any directions concerning premiums and other monies that would otherwise be or become comprised in the Trust Fund subject to such Premiums Trust Deed but (apart from such Trust Deed and such directions) belong to or are payable to such underwriting member in connection with the Underwriting (as defined in such Trust Deed) relating (inter alia) to any particular territory outside the United Kingdom and also power to revoke or amend any subsisting Special Trust Direction and/or Overseas Direction[.]

¹⁵⁹ See the detailed provisions at Lloyd's American Instrument 1995, §3.

¹⁶⁰ Lloyd's American Instrument 1995, §3(a)(i). *Per ibid.*, §1(a)(xxxi), "Specified Excluded Assets" means:-

relevant corporate Member's rights therein;¹⁶² (2) all further accretions to the Lloyd's American Instrument 1995 Fund, however arising;¹⁶³ (3) all investments and other assets representing the foregoing;¹⁶⁴ (4) all income thereof.¹⁶⁵ The Lloyd's American Instrument 1995 contains provisions¹⁶⁶ governing premiums arising under "Old American Business" (as defined¹⁶⁷).

application of the Instrument Fund

- 4.27 Lloyd's American Instrument 1995 provides that the Lloyd's American Instrument 1995 Fund is to be applied to pay or otherwise discharge: (1) the corporate Member's "New American Business Deposit Funding Obligations"¹⁶⁸ (as defined¹⁶⁹); (2) any losses, claims, outward reinsurance premiums, return of

all recoveries from (or from what previously was) a Relevant Cause of Action all PSL Rights of Recovery and monies received from (or from what previously was) a PSL Right of Recovery all Auction Proceeds and all assets for the time being representing any of the foregoing respectively[.]

- 161 *Per* Lloyd's American Instrument 1995, §1(a), "New American Business" means:-

all American Business that relates to any contract or policy of insurance or reinsurance underwritten or incepting on or after 1st August 1995 other than (and except only for) — (1) contracts or policies underwritten under a binding authority incepting prior to that date[.] (2) contracts or policies of insurance written pursuant to Lloyd's licence in Kentucky prior to 1st January 1996 and (3) any contract of Reinsurance to Close for any Year of Account underwritten by the Corporate Member to the extent only that: (i) the premium payable to or for the account of the Corporate Member has been paid or is payable in US dollars or the liability of the Corporate Member in respect of such contract is expressed in US dollars; and (ii) the Corporate Member is liable under such contract in respect of contracts or policies of insurance or reinsurance underwritten by underwriting members of Lloyd's which either (1) incepted prior to 1st August 1995 (2) were underwritten under a binding authority incepting prior to that date or (3) were underwritten pursuant to Lloyd's licence in Kentucky prior to 1st January 1996[.]

"American Business" means business complying with the "American Conditions": *ibid.*, §1(a)(iii).

- 162 Lloyd's American Instrument 1995, §3(a)(i).

- 163 Lloyd's American Instrument 1995, §3(a)(ii).

- 164 Lloyd's American Instrument 1995, §3(a)(iii).

- 165 Lloyd's American Instrument 1995, §3(a)(iv); *ibid.*, §13.

- 166 See Lloyd's American Instrument 1995, §3(b); *q.v.* for detailed provisions.

- 167 *Per* Lloyd's American Instrument 1995, §1(a)(xxiii), "Old American Business" means "American Business other than (and apart from[.]) New American Business".

- 168 Lloyd's American Instrument 1995, §4(a)(i).

- 169 *Per* Lloyd's American Instrument 1995, §4(a)(i), "New American Business Deposit Funding Obligations" means the corporate Member's obligation to provide, or keep fully funded, any and every "Continental Business Regulatory Deposit" and "Offshore Dollar Business Regulatory Deposit". *Per ibid.*, §1(a)(viii), "Continental Business Regulatory Deposit" means, broadly, any US surplus lines trust deed or US reinsurance trust deed or any other deposit trust deed, including any joint assets trust deed, or any company bank account, LC, guarantee or other vehicle whatever, wherever situated, which is both approved by the Treasury and which the corporate Member is regulatorily required to keep in funds; *q.v.* for detailed definition. *Per ibid.*, §1(a)(xxi), "Offshore Dollar Business Regulatory Deposit" means, broadly, any "Overseas Business Regulatory Deposit", except a "Continental Business Regulatory Deposit", which the corporate Member is regulatorily required to provide or keep in funds in order to enable the corporate Member to conduct "Offshore New American Business"; *q.v.* for detailed definition. *Per ibid.*, §1(a)(xxv), "Overseas Business Regulatory Deposit" means the corporate Member's obligations to provide or keep fully funded any and every "Overseas Business Regulatory Deposit". *Per ibid.*, §1(a)(xxii), "Offshore New American Business" means "New American Business" excluding "Continental New American Business". *Per ibid.*, §1(a)(ix), "Continental New American Business" means "US Situs New American Business" and "Canadian Situs New American Business". *Per ibid.*, §1(a)(xxxv), "US Situs New American Business" means:-

all New American Business which involves the provisions of insurance or reinsurance with respect to property or risks which is or are or will be ordinarily situated in (or the provision of reinsurance to an insurer which is resident or domiciled in) a state district territory commonwealth or possession of the United States of America[.]

Per ibid., §1(a)(vi), "Canadian Situs New American Business" means:-

all New American Business (not being US Situs New American Business) which involves the provision of insurance or reinsurance with respect to property or risks which is or are or will be ordinarily situated in

premium, and other outgoings currently payable or payable at any time in the future in connection with any "New American Business";¹⁷⁰ (3) relevant expenses.¹⁷¹ Each relevant managing agency has a discretion as to the order in which and the extent to which such liabilities are actually discharged.¹⁷²

assured's direct rights

- 4.28** Lloyd's American Instrument 1995 provides that no "policyholder" (not defined¹⁷³) is entitled to an account of any Lloyd's American Instrument 1995 Fund, its income, administration or disposition "or any aspect thereof", or to see any of the trustees' or managing agency's or corporate Member's "books paper accounts vouchers or records",¹⁷⁴ until: (1) the assured has obtained a final¹⁷⁵ judgment against the corporate Member¹⁷⁶ in respect of the latter's liability under a relevant insurance contract or policy, in either an English court or a court whose judgment is enforceable in England after registration or extension;¹⁷⁷ (2) a copy of the judgment has been delivered to the relevant managing agency with such proof of its finality and subsistence as the managing agency requires;¹⁷⁸ (3) forty-two days have expired from the date of such delivery and the judgment has not been satisfied.¹⁷⁹ But none of these things *per se* expressly entitles the assured to any payment out of any Lloyd's American Instrument 1995 Fund.¹⁸⁰

Lloyd's US Surplus-Lines PU TF 1999

how many; parties

- 4.29** The relevant deed has recently been amended. US Surplus-Lines PU TD 1999 is the PU counterpart of US Surplus-Lines CU TD 1999. Each¹⁸¹ relevant Member enters into one standard-form, uniform, non-negotiable US Surplus-Lines PU TD 1999.

(or the provision of reinsurance to an insurer which is resident or domiciled in) a province territory or possession of Canada[.]

- ¹⁷⁰ Lloyd's American Instrument 1995, §4(a)(ii). Such liabilities are termed "New American Business Underwriting payments": *ibid*.
- ¹⁷¹ Lloyd's American Instrument 1995, §4(a)(iii); *q.v.* for detailed provisions. Such expenses are termed "New American Business expenses": *ibid*.
- ¹⁷² Lloyd's American Instrument 1995, §8; *q.v.* for detailed provisions.
- ¹⁷³ See Lloyd's American Instrument 1995, §17(b) ("No policyholder or other person having or alleging any claim or demand against the Corporate Member ...").
- ¹⁷⁴ Lloyd's American Instrument 1995, §17(b).
- ¹⁷⁵ Lloyd's American Instrument 1995, §17(b)(ii).
- ¹⁷⁶ Lloyd's American Instrument 1995, §17(b)(i). *Cf.* the requirement in, for example, LATD (general) 1999, §5.2(A) (the judgment can be obtained against either the "Name" or the "Syndicate").
- ¹⁷⁷ Lloyd's American Instrument 1995, §17(b)(i).
- ¹⁷⁸ Lloyd's American Instrument 1995, §17(b)(iii).
- ¹⁷⁹ Lloyd's American Instrument 1995, §17(b)(iv).
- ¹⁸⁰ *Cf.* LATD (general) 1999, §§5.3 and 5.4.
- ¹⁸¹ See Lloyd's US Surplus-Lines PU TD 1999, §6.10:-

The Trusts initially created hereunder by the Present Underwriters: (a) in relation to the 1995 year of account of the Syndicate, shall relate to American Policies allocable to the short year August 1 through December 31, 1995; or (b) in relation to any other year of account of the Syndicate, shall relate to American Policies allocable to such year of account. Thereafter, each Underwriter allocating premium limits to the Syndicate in a subsequent year of account by entry into this Deed of Trust establishes a new Trust hereunder for such year of account upon the terms hereof[.]

And see *ibid.*, [first §]: "This DEED OF TRUST ... DECLARED by each of the grantors of the Trusts created hereunder"; *ibid.*, first recital ("[E]ach of the Underwriters is engaged in the insurance business ..."), *ibid.*, second recital ("[E]ach of the Underwriters desires to establish a trust fund ..."); *ibid.*, [now therefore §] ("[E]ach of the Underwriters creating a trust hereunder ...") — more accurately, each Underwriter creates his own separate trust *Cf.* Lloyd's US Surplus-Lines CU TD 1999, [1st §] ("Current

purpose; regulatory aspects

- 4.30 US Surplus-Lines PU TD 1999's broad purpose is to sequester premium and other relevant assets so as to securitise, separately and distinctly from any other relevant trust fund, the payment to a "Policyholder"¹⁸² of a "Matured Claim" (as defined¹⁸³) made under an "American Policy" (as defined¹⁸⁴). The deed is governed by New York law.¹⁸⁵

termination of the trust

- 4.31 The trust terminates on the first to occur of the following: (1) five years from the date of the Council's written notice to the Trustee of the trust's termination;¹⁸⁶ (2) sixty days after the "Agent" (as defined¹⁸⁷) has sent written notice to the trustee that the Underwriter either has become qualified and licensed to conduct an insurance business in all US states "where he has direct insurance in force",¹⁸⁸ or has entered into an assumption and assignment agreement creating a novation transferring all liability for risks covered by US Surplus-Lines PU TD 1999 to an insurer either

Contributors to the Trust Fund"), *ibid.*, first recital ("Underwriters are or have been engaged in the insurance business ..."), *ibid.*, second recital ("Underwriters have ... established a trust fund ..."), etc.

- 182 Per Lloyd's US Surplus-Lines PU TD 1999, §1.18, "Policyholder" means:-

the holder of an American Policy resident or doing business in the United States at any time during the period of coverage of such policy, and any other persons or associations who are assignees, pledgees, or mortgagees named therein[.]

And see *ibid.*, first recital ("[E]ach of the Underwriters is engaged in the insurance business and has or will have Policyholders (as defined herein) in the United States of America as a result of accepting insurance on a surplus or excess lines basis on risks therefrom").

- 183 Per Lloyd's US Surplus-Lines PU TD 1999, §1.13, "Matured Claim" means:-

a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 hereof[.]

- 184 Per Lloyd's US Surplus-Lines PU TD 1999, §1.2, "American Policy" means:-

(a) any contract or policy of insurance (or any agreement to insure) incepting on or after August 1, 1995 (excluding all contracts or policies of insurance underwritten or any agreement to insure to be underwritten by the Underwriter as a member of the Syndicate under any binding authority incepting prior to that date and attaching on or prior to November 15, 1995) issued to a Policyholder (as defined herein) pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which some or all of the members of the Syndicate are not at that time licensed to do insurance business (i) which is underwritten by the Underwriter as a member of the Syndicate on or after August 1, 1995, and (ii) which is allocable to the year of account of the Syndicate corresponding to the particular Trust Fund; or (b) any contract or policy of insurance underwritten on or after August 1, 1995, and issued to a Policyholder (as defined herein) pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which some or all of the members of the Syndicate are not at that time licensed to do insurance business, in respect of which the Underwriter is liable as a member of the Syndicate for the year of account of the Syndicate corresponding to the particular Trust Fund to members of the same Syndicate or any other syndicate for an earlier year of account pursuant to any contract of Reinsurance to Close (as defined herein).

Per *ibid.*, §1.23, "Reinsurance to Close" means:-

an agreement under which underwriting members ("the reinsured members") who are members of a syndicate for a year of account ("the closed year") agree with underwriting members who comprise that or another syndicate for a later year of account ("the reinsuring members") that the reinsuring members will indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year[.]

- 185 Lloyd's US Surplus-Lines PU TD 1999, §6.2.

- 186 Lloyd's US Surplus-Lines PU TD 1999, §2.1(a).

- 187 Per Lloyd's US Surplus-Lines PU TD 1999, §1.1, "Agent" means:-

the managing agent at Lloyd's appointed by or on behalf of the Underwriter to act, and who is acting, as an agent of the Underwriter for the purpose of conducting the underwriting business of the Underwriter as a member of the Syndicate (referred to above as the "Managing Agent"), including any successors so acting of the underwriting agent so appointed and any substitute agent appointed by the Council; and shall, when the context so admits include a reference to any Representative of the Agent, as defined herein[.]

On "Representative of the Agent" and "Representatives", see *ibid.*, §1.24.

- 188 Lloyd's US Surplus-Lines PU TD 1999, §2.1(b)(i).

licensed to do business in those states or listed by IID;¹⁸⁹ (3) twenty-one years from the Underwriter's death or (if a corporate body or partnership) eighty years from the date on which it executed the "Lloyd's Premiums Trust Deed"¹⁹⁰ (as defined¹⁹¹).

paying out trust monies; threat to Trust Fund Minimum Amount; Market has ceased trading

- 4.32** If the Trustee determines — relying on the fund's most recent valuation¹⁹² — that paying a Matured Claim would reduce the fund to below the "Trust Fund Minimum Amount" (as defined¹⁹³), or if the Trustee had received notice that the Market has ceased trading,¹⁹⁴ the trust deed's provisions on "inadequacy of the trust fund assets"¹⁹⁵ govern.¹⁹⁶ If the Trustee does make such a determination, it must notify the IID, the Domiciliary Commissioner and the "Non-Domiciliary Commissioner"¹⁹⁷ (as defined¹⁹⁸).

withdrawal of trust fund assets

- 4.33** US Surplus-Lines PU TD 1999 permits the Agent to direct the Trustee — subject to relevant Council requirements — to transfer trust funds in excess of the Trust Fund Minimum Amount as last timeously notified¹⁹⁹ to an "Overseas Fund"²⁰⁰ (as defined). No withdrawal is permitted if there has been no timeous notification.²⁰¹ Funds withdrawn to pay Claims under American Policies are considered to be funds in excess of the Trust Fund Minimum Amount.²⁰² Before any such withdrawal, the Agent must provide written notice to the Trustee, Domiciliary Commissioner, the Non-Domiciliary Commissioner and the IID.²⁰³ The notice must specify the reserve

¹⁸⁹ Lloyd's US Surplus-Lines PU TD 1999, §2.1(b)(ii).

¹⁹⁰ Lloyd's US Surplus-Lines PU TD 1999, §2.1(c).

¹⁹¹ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.12, "Lloyd's Premiums Trust Deed" means:-
the Lloyd's Premiums Trust Deed approved by Her Majesty's Treasury or Financial Services Authority pursuant to the Insurance Companies Act ... 1982, executed by the Underwriter in respect of insurance business at Lloyd's other than long term business[.]

¹⁹² Lloyd's US Surplus-Lines PU TD 1999, §2.3 after (e).

¹⁹³ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.28, "Trust Fund Minimum Amount" means, broadly (*q.v.* for detailed provisions), the amount "required to be maintained in trust by the Underwriter pursuant to the insurance laws and rules and regulations of the IID or the states where the Syndicate maintains eligibility as an excess or surplus lines insurer, whichever amount is greater" subject to the proviso at *ibid.*; *q.v.* for detailed provisions. And see the detailed provisions at *ibid.*, §2.7 ("Notice of Trust Fund Minimum Amount"), requiring the Agent to advise the Trustee, quarterly, as to the "aggregate Trust Fund Minimum Amount for each year of account of the Syndicate and the portion thereof allocable to each Trust Fund".

¹⁹⁴ See generally Lloyd's US Surplus-Lines PU TD 1999, §5.1.

¹⁹⁵ See generally Lloyd's US Surplus-Lines PU TD 1999, §5.

¹⁹⁶ Lloyd's US Surplus-Lines PU TD 1999, §2.3 after (e).

¹⁹⁷ Lloyd's US Surplus-Lines PU TD 1999, §2.3 after (e).

¹⁹⁸ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.15 "Non-Domiciliary Commissioner" means:-
the Chief Regulatory Officer for Insurance other than the Domiciliary Commissioner in any state, territory, district, commonwealth or possession of the United States in which the Underwriters have Policyholders and who has provided the Trustee with written notice that he or she requires any notification required to be made to the Domiciliary Commissioner pursuant to this agreement[.]

¹⁹⁹ On which see Lloyd's US Surplus-Lines PU TD 1999, §2.7.

²⁰⁰ Lloyd's US Surplus-Lines PU TD 1999, §2.10; *q.v.* for detailed provisions.

²⁰¹ Lloyd's US Surplus-Lines PU TD 1999, §2.10.

²⁰² Lloyd's US Surplus-Lines PU TD 1999, §2.10.

²⁰³ Lloyd's US Surplus-Lines PU TD 1999, §2.10.

for the payment of the Claims that the withdrawal is intended to pay, and the withdrawal cannot exceed the amount previously reserved to pay those Claims.²⁰⁴

'Matured Claim'

- 4.34** A "Matured Claim" is a "Claim" (as defined²⁰⁵) that satisfies the following conditions: (1) the Policyholder or Third-Party Claimant has obtained a judgment in a US court of competent jurisdiction or has obtained a binding arbitration award, against the "Underwriters",²⁰⁶ in relation to the Underwriters' liability under an American Policy; (2) the judgment or award has become final;²⁰⁷ (3) the Trustee has been served with a certified copy of the judgment or award plus such proof of its finality as the Trustee may reasonably require;²⁰⁸ (4) receipt (presumably by the Trustee) of a written sworn statement, from the Beneficiary²⁰⁹ or his lawyer, of the relevant SYAs²¹⁰ and their respective proportions;²¹¹ that the Claim does not include exemplary or punitive damages, or extra-contractual damages not expressly covered by the Policy; the component of the Claim which is Unearned Premium; and that the Beneficiary has "complied" with the first three requirements;²¹² (5) the expiry of the familiar thirty days from the date of service on the Trustee without the Trustee having received notice from the Council that the judgment²¹³ has not been satisfied.²¹⁴

priorities

- 4.35** Priority of payments out is: (1) first, to pay relevant specified fees and expenses ("Trustee Priority Claims") subject to a maximum in any one calendar year;²¹⁵ (2)

²⁰⁴ Lloyd's US Surplus-Lines PU TD 1999, §2.10.

²⁰⁵ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.4, "Claim" means:-

(i) a claim against the Underwriter by a Policyholder or Third-Party Claimant, as defined herein, for a loss under an American Policy excluding punitive or exemplary damages awarded against a Policyholder and also excluding any extracontractual obligations not expressly covered by the American Policy ... ("Loss") or (ii) a claim against the Underwriter by a Policyholder for the return of unearned premium under an American Policy ("Unearned Premium")[.]

²⁰⁶ Lloyd's US Surplus-Lines PU TD 1999, §2.3(a). Presumably "Underwriter" is intended.

²⁰⁷ Lloyd's US Surplus-Lines PU TD 1999, §2.3(b) — either through failure to timeously appeal or through an appeal's final disposition.

²⁰⁸ Lloyd's US Surplus-Lines PU TD 1999, §2.3(c).

²⁰⁹ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.3, "Beneficiary" means either a "Policyholder" or a "Third-Party Claimant".

²¹⁰ See the curious wording at Lloyd's US Surplus-Lines PU TD 1999, §2.3(d) ("the Syndicate and year of account *of the American Policy*"; italics added).

²¹¹ Lloyd's US Surplus-Lines PU TD 1999, §2.3(d):-

... or if the Claim relates to more than one Syndicate or more than one year of account, the portion of the Claim that relates to each such Syndicate and year of account[.]

Such data do not of course assist in determining the liability under an American Policy of any SYA participant (unless spurious or nearly so).

²¹² Lloyd's US Surplus-Lines PU TD 1999, §2.3(d).

²¹³ Lloyd's US Surplus-Lines PU TD 1999, §2.3(e) omits "award", presumably unintentionally.

²¹⁴ Lloyd's US Surplus-Lines PU TD 1999, §2.3(e), and see the detailed provisions following *ibid.*, which are in similar form to those in other relevant US trust deeds.

²¹⁵ Lloyd's US Surplus-Lines PU TD 1999, §2.2 ("... shall be limited to the trust's pro rata share (based on the aggregate value of all Trust Funds held under this Deed for the Syndicate) of an amount equal to the lesser of \$50,000 or 10% of the aggregate value of all Trust Funds held under this Deed for the Syndicate"). And see *ibid.*, §3.7. *Per ibid.*, [first §], "Syndicate" appears to mean a syndicate rather than a SYA ("This deed of trust, dated ____ declared by each of the grantors of the trusts created hereunder, each of whom is a member of Syndicate No. _____ (the "Syndicate") at Lloyd's for the 1999 year of account ...").

second, to use any surplus to pay a "Matured Claim" for a "Loss" and a "Claim" for a "Loss";²¹⁶ (3) third,²¹⁷ to pay a "Matured Claim" for "Unearned Premium".²¹⁸ When a Matured Claim (or presumably any "Claim" for a "Loss") has qualified for payment, the Trustee must pay it by certified cheque, mailed to the Policyholder or Third-Party Claimant, solely out of the Trust Fund then in its actual and "sole" possession — on which there are detailed provisions²¹⁹ — without regard, other than in the case of a Matured Claim for Unearned Premium, to the rights of any other Policyholder.²²⁰ The Policyholder's or Third-Party Claimant's right lies solely against the assets in the trust fund.²²¹ No Policyholder or Third-Party Claimant may require the Trustee to account to him, inquire into the Trust's administration, question any of the Trustee's relevant acts or omissions or otherwise enforce the deed,²²² his "sole right" being to receive the full amount of the Matured Claim from assets "then" both in the Trust Fund and available for such payment under the deed.²²³

inadequacy

- 4.36** US Surplus-Lines PU TD 1999 has detailed provisions governing the fund's availability in the event of "inadequacy".²²⁴ The trust fund is deemed to be "inadequate" on the earlier of the following: (1) the Trustee receives written notice from the Agent, the US Representative, the UK Treasury, the FSA, the Domiciliary Commissioner, any Non-Domiciliary Commissioner or the IID that the Market has ceased trading;²²⁵ (2) sixty days after the aggregate value of the trust funds held under the deed for the relevant Syndicate, as most recently valued, fell below the Trust Fund Minimum Amount.²²⁶ The sixty days allows the fund to be supplemented ("replenished") by or on behalf of the "Underwriter" (as defined) to

²¹⁶ Lloyd's US Surplus-Lines PU TD 1999, §2.2.

²¹⁷ But see the wording at Lloyd's US Surplus-Lines PU TD 1999, §2.2, last sentence (italics added):-
The Trustee shall pay a Matured Claim for Unearned Premium after *receipt* of a Claim for Losses which has not yet become a Matured Claim for any reason[.]
Presumably "receipt" is error for "payment in full".

²¹⁸ Lloyd's US Surplus-Lines PU TD 1999, §2.2.

²¹⁹ See generally Lloyd's US Surplus-Lines PU TD 1999, §2.5(b). The Trustee must effect payment in accordance with the Agent's written instructions, if any: *ibid.* If the Trustee does not receive such instructions at least ten days before the expiry of the 30-day period in *ibid.*, §2.3(e), then the remaining provisions of *ibid.*, §2.5(b) govern: the Trustee must have recourse first to cash (*ibid.*, §(i)); then to the sale proceeds of Readily Marketable Securities or other investments other than LCs (*ibid.*, §(ii)); then any other trust fund assets other than LCs (*ibid.*, §(iii)); then LCs (*ibid.*, §(iv)). And see *ibid.*, §1.27 (definition of "Trust Fund").

²²⁰ Lloyd's US Surplus-Lines PU TD 1999, §2.3 after (e).

²²¹ Lloyd's US Surplus-Lines PU TD 1999, §2.4:-
No Policyholder or Third Party Claimant shall have any right of any nature or description under this Deed of Trust to seek to enforce a Claim or otherwise bring an action against the Trustee in respect of any assets of the Trustee or of any assets other than those in the Trust Fund[.]

²²² Lloyd's US Surplus-Lines PU TD 1999, §2.4.

²²³ Lloyd's US Surplus-Lines PU TD 1999, §2.4.

²²⁴ See generally Lloyd's US Surplus-Lines PU TD 1999, §5.

²²⁵ Lloyd's US Surplus-Lines PU TD 1999, §5.1(a). There is no equivalent of Lloyd's US Surplus-Lines CU TD 1999, §4.2(a).

²²⁶ Lloyd's US Surplus-Lines PU TD 1999, §4.1(b). On valuation, see *ibid.*, §2.13. The Trustee must "promptly" notify the Agent, copy to the Domiciliary Commissioner, all Non-Domiciliary Commissioners, and the IID, after receiving a statement of the aggregate trust funds showing the deficiency (*ibid.*), presumably (but not expressly) before the sixty days have expired, presumably to give the Agent sufficient time to top up the fund.

avoid such a deemed inadequacy.²²⁷ On the occurrence of either "inadequacy" event, the Trustee must notify the Agent, the Domiciliary Commissioner, all Non-Domiciliary Commissioners, the IID, and Underwriters' US representative.²²⁸ There then follows a one-year waiting period, during which, generally,²²⁹ no Claims other than Trustee's Priority Claims (as defined) may be paid out of the fund.²³⁰ The waiting period begins: (1) if because the Market has ceased trading, on the date the Trustee receives written notice of that;²³¹ (2) if because the trust fund has fallen below the Trust Fund Minimum Amount, on the date the Trustee is required to "transmit a notice to the Agent pursuant to Paragraph 5.1(b)".²³² The trust fund is then disposed of as directed by the Domiciliary Commissioner or a US court of competent jurisdiction.²³³ If the trust fund has been transferred to the Domiciliary Commissioner, he must apply it according to New York law applying to the liquidation of insurance companies,²³⁴ surplus assets after discharging Trustee's Priority Claims to revert to the Trustee, to then be transferred by it to an "Overseas Fund" (as defined²³⁵) as directed by the Agent.²³⁶

Lloyd's US Surplus-Lines CU TF 1999

generally

- 4.37** US Surplus-Lines CU TD 1999, governed by New York law,²³⁷ is the CU counterpart of US Surplus-Lines PU TD 1999, intended to supplement, not replace, insurer's contractual obligations.²³⁸ It securitises to a "Beneficiary" (as defined²³⁹)

²²⁷ See generally Lloyd's US Surplus-Lines PU TD 1999, §5.1(b).

²²⁸ Lloyd's US Surplus-Lines PU TD 1999, §5.2(a) (insolvency event under *ibid.*, §5.1(a)), which is defective: *ibid.*, §(i) does not specify a recipient of the written notice required in *ibid.*, and *ibid.*, §(ii) says "such declaration" (presumably intending the *ibid.*, §5.2(a)(i) notice) without previously using the word. And see *ibid.*, §5.2(b) (insolvency event under *ibid.*, §5.1(b), adding any Representative of the Agent as an alternative to the Agent, and the Underwriter's US Representative).

²²⁹ See the detailed provisions at Lloyd's US Surplus-Lines PU TD 1999, §5.3.

²³⁰ Lloyd's US Surplus-Lines PU TD 1999, §5.3.

²³¹ Lloyd's US Surplus-Lines PU TD 1999, §5.3.

²³² Lloyd's US Surplus-Lines PU TD 1999, §5.3.

²³³ Lloyd's US Surplus-Lines PU TD 1999, §5.4; *q.v.* for detailed provisions.

²³⁴ Lloyd's US Surplus-Lines PU TD 1999, §5.5.

²³⁵ *Per* Lloyd's US Surplus-Lines PU TD 1999, §1.17, "Overseas Fund" means "the Lloyd's Premium Trust Fund or any trust fund set up with respect to the Underwriter which is constituted or regulated by an Overseas Direction under the Lloyd's Premiums Trust Deed (as therein defined)".

²³⁶ Lloyd's US Surplus-Lines PU TD 1999, §5.5; *q.v.* for detailed provisions.

²³⁷ Lloyd's US Surplus-Lines CU TD 1999, §5.1.

²³⁸ Lloyd's US Surplus-Lines CU TD 1999, §5.3:-

Nothing in this Trust Deed shall affect or limit Underwriters' obligation to make payment of insurance claims against them.

²³⁹ *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.2, "Beneficiary" means any "Policyholder" or "Third Party Claimant" ("Third Party" not hyphenated in *ibid.*, §1.2). *Per ibid.*, §1.15, "Policyholder" means "the holder of an American Policy resident or doing business in the United States, and any other persons or associations who are assignees, pledgees, or mortgagees named therein". *Per ibid.*, §1.19, "Third-Party Claimant" (note hyphen) means "one not a party to the insurance contract but having a final judgment or arbitration award against Underwriters for Claims or Loss covered by an American Policy". *Per ibid.*, §1.22, "Underwriters" means:-

underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt[.]

Note the error "former underwriters at Lloyd's London": there is no such group. Presumably "former Members" is meant. The error unwittingly underlines the insurer's continuing contractual liability notwithstanding termination of Membership.

full payment of "Claims" (as defined²⁴⁰) The parties are the Corporation, the Grantors and the Trustee.²⁴¹ The Grantors are Current Contributors collectively.²⁴² It is signed by Lloyd's Signatory (as defined²⁴³); Citibank NA as Trustee,²⁴⁴ said to be executed "by"²⁴⁵ the "Current Contributors" (as defined²⁴⁶), and envisages further signatories as appropriate in the future.²⁴⁷ The deed recites the existence of "Policyholders in the United States of America as a result of accepting insurance exported to them pursuant to surplus or excess lines laws of the several states covering risks therein";²⁴⁸ indicates the trust fund is to both secure those assureds plus Third Party Claimants and enable "Underwriters" to qualify as "an eligible or approved surplus or excess lines insurer" in those US states.²⁴⁹ The Trustee administers the trust fund principally from its New York City office.²⁵⁰ Further contributions accruing to the trust fund are subject to the deed.²⁵¹ The trust fund established by the trust deed cannot be revoked,²⁵² and is required to persist either: (1) for at least five years from the date on which the Council gives the Trustee written notice of the trust's termination;²⁵³ or (2) sixty days after the Council has sent written notice to the Trustee either that all Underwriters have become qualified and licensed to conduct insurance business in all US states "where they have direct insurance in force",²⁵⁴ or have entered into an assumption and assignment agreement creating a novation transferring all liability for all risks covered by the trust fund to an insurer licensed to do insurance business in those states or to an

²⁴⁰ *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.3, "Claim" means:-

(i) a claim against one or more Underwriters by a Policyholder ... or Third Party Claimant for a loss under an American Policy excluding punitive or exemplary damages awarded to or against a Policyholder and also excluding any extra contractual obligations not expressly covered by the American Policy ("Loss"); or
(ii) a claim against one or more Underwriters by a Policyholder for the return of unearned premium under an American Policy ("Unearned Premium") [.]

²⁴¹ Lloyd's US Surplus-Lines CU TD 1999, introductory §.

²⁴² Lloyd's US Surplus-Lines CU TD 1999, introductory §.

²⁴³ *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.11, "Lloyd's Signatory" means, broadly, any person authorised from time to time by the Council, and designated in writing to the Trustee, for that purpose. *Q.v.* for detailed definition.

²⁴⁴ Lloyd's US Surplus-Lines CU TD 1999, introductory §.

²⁴⁵ Lloyd's US Surplus-Lines CU TD 1999, introductory §.

²⁴⁶ *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.6, "Current Contributors" means:-

those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters) whose contributions to the Trust Fund constitute the principal of the Trust Fund for the time being, the total amount contributed for the time being to be the "Current Contributions," and each contribution to the Trust Fund to be a "Current Contribution."

²⁴⁷ Lloyd's US Surplus-Lines CU TD 1999, introductory § ("... and will in [the] future be executed and acceded to by those persons (whether individuals, bodies corporate or partnerships and whether or not Underwriters at Lloyd's London) who become in the future Current Contributors to the Trust Fund ...").

²⁴⁸ Lloyd's US Surplus-Lines CU TD 1999, first recital. *Ibid.* does not say why the assured is in the US, or where the risk is.

²⁴⁹ Lloyd's US Surplus-Lines CU TD 1999, second recital.

²⁵⁰ Lloyd's US Surplus-Lines CU TD 1999, fourth recital.

²⁵¹ Lloyd's US Surplus-Lines CU TD 1999, §2.9.

²⁵² Lloyd's US Surplus-Lines CU TD 1999, §2.1, which erroneously says that the trust *fund* is irrevocable.

²⁵³ Lloyd's US Surplus-Lines CU TD 1999, §2.1(a).

²⁵⁴ Lloyd's US Surplus-Lines CU TD 1999, §2.1(b)(i). "[W]here they have direct insurance in force" is ambiguous or meaningless.

insurer "listed by the IID".²⁵⁵ In either case, the written notice must include a list of all US state in which the Underwriters have American Policies in force.²⁵⁶

'American Policy'

- 4.38** "American Policy" means: "(i) any contract or policy of insurance issued or any agreement to insure made by one or more Underwriters pursuant to surplus lines or excess lines laws of any state, district, territory, commonwealth or possession of the United States in which Underwriters are not licensed to do an insurance business; provided that, with the exception of such Policies attaching on or prior to November 15, 1995 underwritten under any binding authority incepting prior to August 1, 1995, and subject to (ii) below, such Policies shall not include any contract or policy of insurance (or any agreement to insure) incepting on or after August 1, 1995, which is (or is to be) underwritten by Underwriters on or after August 1, 1995; or (ii) any contract or policy of insurance or any agreement to insure which satisfies the definition of an American Policy as set forth in Lloyd's United States Situs Surplus Lines Trust Deed as prescribed from time to time by [the] Council."²⁵⁷

what is a "Matured Claim"?

- 4.39** A "Matured Claim" is, broadly,²⁵⁸ a claim satisfying the following six conditions: (1) a Beneficiary has obtained, against a particular Underwriter in respect of his liability under an American Policy — as to which fact there are specific provisions²⁵⁹ — either a judgment from a court of competent jurisdiction within the US, its territories or its possessions, or a binding arbitration award;²⁶⁰ (2) such judgment or award is final;²⁶¹ (3) the Trustee has been served with a certified copy of the judgment or award, plus such proof of its finality as the Trustee may reasonably require;²⁶² (4) receipt, by an unspecified party (presumably²⁶³ the Trustee directly rather than indirectly), of a written sworn unqualified statement from the Beneficiary's lawyer that the Beneficiary has pursued all his rights and remedies against the relevant Underwriter under the Lloyd's American Trust Deed,

²⁵⁵ Lloyd's US Surplus-Lines CU TD 1999, §2.1(b)(ii).

²⁵⁶ Lloyd's US Surplus-Lines CU TD 1999, §2.1(b).

²⁵⁷ Lloyd's US Surplus-Lines CU TD 1999, §1.1.

²⁵⁸ See the detailed provisions at Lloyd's US Surplus-Lines CU TD 1999, §2.3.

²⁵⁹ The Trustee is entitled to rely on the Council's statement that the judgment or award does (or, presumably, does not) relate to liability under an American Policy: Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f). If the Council does not notify the Trustee at least ten days before the expiry of the 30-day period, the judgment or award is deemed to relate to liability under an American Policy: *ibid.*, §2.3 after (f). If the Council determines that the judgment or award does *not* relate to liability under an American Policy, the Council must within ten days of the expiry of the 30-day period so notify the Trustee, who in turn must notify the "Domiciliary Commissioner" (as defined; per *ibid.*, §1.7, "Domiciliary Commissioner" means "the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered, identified on page one of this Trust Deed", *viz.*, New York), who makes his own conclusive determination, binding on "all parties", whether the judgment or award relates to liability under an American Policy: *ibid.* §2.3 after (f).

²⁶⁰ Lloyd's US Surplus-Lines CU TD 1999, §2.3(a).

²⁶¹ Lloyd's US Surplus-Lines CU TD 1999, §2.3(b). The judgment or award must have become:-
final in the sense that the particular litigation or arbitration has been concluded, either through failure to appeal within the time permitted therefor or through final disposition of any appeal or appeals that may be taken, the word "appeal" being used herein to include any similar procedure for review permitted by applicable law[.]

²⁶² Lloyd's US Surplus-Lines CU TD 1999, §2.3(c).

²⁶³ Because see Lloyd's US Surplus-Lines CU TD 1999, §2.3(f).

Lloyd's Central Fund United States Trust Deed, Lloyd's Central Fund United States Trust Deed (Number 2), and Lloyd's United States Surplus Lines Trust Deed, or any replacement, and that the Beneficiary's Claim on US Surplus-Lines CU TD 1999 is net of the remaining unsatisfied after all recourse to the other trust funds has been "exhausted";²⁶⁴ (5) receipt, by an unspecified party, of a written sworn statement from the Beneficiary's lawyer that (among other things²⁶⁵) the Claim does not include exemplary or punitive damages or any extra-contractual obligation not expressly covered by the American Policy, and specifying any Unearned Premium component of the Claim;²⁶⁶ (6) the Trustee — which must "promptly" notify the Council of a Claim that the trustee has deemed to meet the foregoing conditions²⁶⁷ — has been served with the foregoing documents and has not received, within thirty²⁶⁸ days, notice from the Council that the judgment²⁶⁹ has been satisfied.²⁷⁰

paying out trust monies; threat to Trust Fund Minimum Amount; Market has ceased trading

- 4.40** Priority of payments out is: (1) first, to pay relevant specified fees and expenses;²⁷¹ (2) second, to use any surplus to pay a "Matured Claim" (as defined²⁷²) for a "Loss" (as defined), and a "Claim" (as defined) for a "Loss" (as defined); (3) third, to pay a "Matured Claim" for "Unearned Premium" (as defined).²⁷³ When a Matured Claim (or presumably any "Claim" for a "Loss") has qualified for payment, the Trustee must pay it by certified cheque, mailed to the Policyholder or Third-Party Claimant, solely out of the Trust Fund then in its actual and "sole" possession — on which there are detailed provisions²⁷⁴ — without regard, other than in the case of a

²⁶⁴ Lloyd's US Surplus-Lines CU TD 1999, §2.3(d).

²⁶⁵ See Lloyd's US Surplus-Lines CU TD 1999, §2.3(e) for full provisions.

²⁶⁶ Lloyd's US Surplus-Lines CU TD 1999, §2.3(e).

²⁶⁷ Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f); apparently in the wrong place.

²⁶⁸ Or whatever lesser period remains before the trust is terminated: Lloyd's US Surplus-Lines CU TD 1999, §2.3(f). But see *ibid.*, §2.3 after (f): "The Council may at any time notify the Trustee if such claim has been satisfied prior to the expiration of the period set forth in subparagraph (e) above". "[S]ubparagraph (e)" is an error for "subparagraph (f)". It is not clear why this concession is not part of (f).

²⁶⁹ Lloyd's US Surplus-Lines CU TD 1999, §2.3(f) omits, presumably erroneously, mention of an arbitration award, on which see for example *ibid.*, §2.3(a)-(b).

²⁷⁰ Lloyd's US Surplus-Lines CU TD 1999, §2.3(f).

²⁷¹ See the highly ambiguous first half of Lloyd's US Surplus-Lines CU TD 1999, §2.2:-

The Trust Fund shall be exclusively available first for the payment of all expenditures and fees under Paragraph 3.9 of this Trust Deed including legal fees and expenses actually incurred by or on behalf of the trustee in connection with its [*sic*] administration, preservation or conservation of the Trust ("Trustee Priority Claims"); provided, however, that this amount shall not exceed \$4,000,000 or 4% of the value of the Trust, whichever is less[.]

Given *ibid.*, §3.9's use of "Trustee Priority Claims" to mean all the fees and expenses contemplated in §3.9, *ibid.*, §2.2's use of "including [etc.]" is confusing and misleading.

²⁷² *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.12, "Matured Claim" means:-

a Claim which is enforceable against the Trust Fund as provided for in Paragraph 2.3 of this Trust Deed[.]

See discussion in the main text.

²⁷³ Lloyd's US Surplus-Lines CU TD 1999, §2.2:-

Losses shall always take priority over Unearned Premium in the payment of claims [*sic*] so that the Trustee shall pay all Matured Claims for Losses in full prior to payment of any part of a Matured Claim for Unearned Premium. The Trustee shall pay a Matured Claim for Unearned Premium after receipt of a Claim for Losses which has not yet become a Matured Claim for any reason[.]

²⁷⁴ See generally Lloyd's US Surplus-Lines CU TD 1999, §2.5(b). The Trustee must effect payment in accordance with the Council's written instructions, if any: *ibid.* If the Trustee does not receive such instructions at least ten days before the expiry of the 30-day period in *ibid.*, §2.3(f), then the remaining provisions of *ibid.*, §2.5(b) govern: the Trustee must have recourse first to cash (*ibid.*, §(i)); then to the

Matured Claim for Unearned Premium, to the rights of any other Policyholder.²⁷⁵ The Policyholder's or Third-Party Claimant's right lies solely against the assets in the trust fund.²⁷⁶ No Policyholder or Third-Party Claimant may require the Trustee to account to him, inquire into the Trust's administration, question any of the Trustee's relevant acts or omissions or otherwise enforce the deed,²⁷⁷ his "sole right" being to receive the full amount of the Matured Claim from assets "then" both in the Trust Fund and available for such payment under the deed.²⁷⁸ If the Trustee determines — relaying on the fund's most recent valuation²⁷⁹ — that paying a Matured Claim would reduce the fund to below the "Trust Fund Minimum Amount" (as defined²⁸⁰), or if the Trustee had received notice that the Market has ceased trading,²⁸¹ the trust deed's provisions on "Insolvencies"²⁸² govern.²⁸³ If the Trustee does make such a determination, it must notify the IID, the Domiciliary Commissioner and the "Non-Domiciliary Commissioner" (as defined²⁸⁴).

insolvency

- 4.41** Lloyd's US Surplus-Lines CU Trust Deed has detailed provisions governing the fund's availability in the event of certain defined "insolvencies".²⁸⁵ The trust fund is deemed to be insolvent on the earlier of the following: (1) the Trustee receives written notice from the Council, the UK Treasury, the FSA, the Domiciliary Commissioner, any Non-Domiciliary Commissioner or the IID that the Market has ceased trading;²⁸⁶ (2) sixty days after the trust fund's value, as most recently valued, fell below the Trust Fund Minimum Amount or would do so if a Matured Claim

sale proceeds of Readily Marketable Securities or other investments other than LCs (*ibid.*, §(ii)); then any other trust fund assets other than LCs (*ibid.*, §(iii)); then LCs (*ibid.*, §(iv)).

²⁷⁵ Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f).

²⁷⁶ Lloyd's US Surplus-Lines CU TD 1999, §2.4:-

No Policyholder or Third Party Claimant shall have any right of any nature or description under this Trust Deed to seek to enforce a Claim or otherwise bring an action against the Trustee in respect of any assets of the Trustee or of any assets other than those in the Trust Fund[.]

²⁷⁷ Lloyd's US Surplus-Lines CU TD 1999, §2.4.

²⁷⁸ Lloyd's US Surplus-Lines CU TD 1999, §2.4.

²⁷⁹ Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f).

²⁸⁰ *Per* Lloyd's US Surplus-Lines CU TD 1999, §2.7, first sentence, "Trust Fund Minimum Amount" means, broadly (*q.v.* for detailed provisions), whatever amount — being or exceeding US\$104m — that the Council happens to notify in writing to the Trustee. The first sentence's wording is defective. The Council does not pass on to the Trustee a legal minimum level determined "by law": there is no such determination. Rather, determination of the Trust Fund Minimum Amount is by the Council itself, to which extent "by law" is unnecessary and misleading: the Council has no legislative powers. The Council may amend that amount from time to time by providing the Trustee with written notice thereof, subject to the fund not falling below US\$104m: *ibid.*, second sentence. Where the Council does not notify the Trustee of a Trust Fund Minimum Amount, that amount is US\$104m.

²⁸¹ See generally Lloyd's US Surplus-Lines CU TD 1999, §4.1.

²⁸² Lloyd's US Surplus-Lines CU TD 1999, §4.

²⁸³ Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f). See the curious repetitive wording.

²⁸⁴ *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.14, "Non-Domiciliary Commissioner" means:- the Chief Regulatory Officer for Insurance other than the Domiciliary Commissioner in any state, territory, district, commonwealth or possession of the United States in which the Underwriters have Policyholders and who has provided the Trustee with written notice that he or she requires any notification required to be made to the Domiciliary Commissioner pursuant to this Deed of Trust[.]

²⁸⁵ See generally Lloyd's US Surplus-Lines CU Trust Deed, §4.

²⁸⁶ Lloyd's US Surplus-Lines CU Trust Deed, §4.1(a). Where the Market does cease trading, the Council must in any event so notify the Trustee, the Domiciliary Commissioner, all Non-Domiciliary Commissioners, the IID, and Underwriters' US representative: *ibid.*, §4.2(a).

was paid.²⁸⁷ The sixty days allows the fund to be supplemented ('replenished') by or on behalf of the 'Underwriters' (as defined) to avoid such a deemed insolvency.²⁸⁸ On the occurrence of either 'insolvency' event, the Trustee must notify the Council, the Domiciliary Commissioner, all Non-Domiciliary Commissioners, the IID, and Underwriters' US representative.²⁸⁹ There then follows a one-year waiting period, during which, generally,²⁹⁰ no Claims other than Trustee's Priority Claims (as defined) may be paid out of the fund.²⁹¹ The waiting period begins: (1) if because the Market has ceased trading, on the date the Trustee receives written notice of that;²⁹² (2) if because the trust fund has fallen below the Trust Fund Minimum Amount, on the date the Trustee is required to "transmit a notice to the Agent pursuant to Paragraph 4.1(b)".²⁹³ The trust fund is then disposed of as directed by the Domiciliary Commissioner or a US court of competent jurisdiction.²⁹⁴ If the trust fund has been transferred to the Domiciliary Commissioner, he must apply it according to New York law applying to the liquidation of insurance companies,²⁹⁵ surplus assets after discharging Trustee's Priority Claims to revert to the Trustee to then be transferred by it to the Current Contributions "in shares bearing the same ratio to the total amount payable as the total Current Contributions of or attributable to each Current Contributor bears to the total of Current Contributions, as directed by the Council".²⁹⁶

Lloyd's Credit-for-Reinsurance CU Trust Deed

generally

- 4.42** US Credit-for-Reinsurance CU²⁹⁷ TD 1999 is in terms similar to those in US Surplus-Lines CU TD 1999. The deed is governed by New York law.²⁹⁸ Attempting to securitise claims under its own definition of an "American Reinsurance Policy"²⁹⁹ (the two deeds' definitions are materially different), by a "Ceding Insurer"

²⁸⁷ Lloyd's US Surplus-Lines CU Trust Deed, §4.1(b). On valuation, see *ibid.*, §2.13. The Trustee must "promptly" notify the Council, copy to the Domiciliary Commissioner, all Non-Domiciliary Commissioners, and the IID, of such actual or anticipated fall (*ibid.*), presumably (but not expressly) before the sixty days have expired, presumably to give the Council sufficient time to top up the fund.

²⁸⁸ See generally Lloyd's US Surplus-Lines CU Trust Deed, §4.1(b).

²⁸⁹ Lloyd's US Surplus-Lines CU Trust Deed, §4.2(b).

²⁹⁰ See the detailed provisions at Lloyd's US Surplus-Lines CU Trust Deed, §4.3.

²⁹¹ Lloyd's US Surplus-Lines CU Trust Deed, 4.3.

²⁹² Lloyd's US Surplus-Lines CU Trust Deed, §4.3.

²⁹³ Lloyd's US Surplus-Lines CU Trust Deed, §4.3. The drafting is defective: there is no such requirement (presumably a word processing error: see Lloyd's US Surplus-Lines PU Trust Deed, §5.3). Presumably, the date on which the Trustee sends the *ibid.*, §4.1(b) notice to the Council is meant.

²⁹⁴ Lloyd's US Surplus-Lines CU Trust Deed, §4.4; *q.v.* for detailed provisions.

²⁹⁵ Lloyd's US Surplus-Lines CU Trust Deed, §4.5.

²⁹⁶ Lloyd's US Surplus-Lines CU Trust Deed, §4.5.

²⁹⁷ See for example Lloyd's US Credit-for-Reinsurance CU TD 1999, [first §], "Current Contributors to the Trust Fund ... (all persons now or becoming Current Contributors to the Trust Fund to be collectively Grantors of the Trusts hereunder) ..."; *ibid.*, second recital ("Underwriters have heretofore established a trust fund in the United States ..."), etc.

²⁹⁸ Lloyd's US Credit-for-Reinsurance CU TD 1999, §5.1; Lloyd's US Credit-for-Reinsurance PU TD 1999, §6.2.

²⁹⁹ *Per* Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.1, "American Reinsurance Policy" means:-

(i) any contract or policy of reinsurance issued or any agreement to reinsure made by one or more Underwriters which is issued to a Ceding Insurer, as defined herein, providing reinsurance with respect to property or risks situated in a state, territory, commonwealth or possession of the United States, provided that, with the exception of such Policies attaching on or prior to November 15, 1995 underwritten under any binding authority incepting prior to August 1, 1995, and subject to (ii) below, such Policies shall not

(as defined;³⁰⁰ broadly identical to the "Policyholder" in similar deeds), each deed is in familiar form — especially including "Underwriter",³⁰¹ "Trust Fund Minimum Amount",³⁰² "Claim",³⁰³ "Matured Claim",³⁰⁴ and "Domiciliary Commissioner".³⁰⁵

include any contract or policy of reinsurance (or any agreement to reinsure) incepting on or after August 1, 1995, which is (or is to be) underwritten by Underwriters on or after August 1, 1995; or (ii) any contract or policy of reinsurance or any agreement to reinsure which satisfies the definition of an American Reinsurance Policy as set forth in Lloyd's United States Situs Credit For Reinsurance Trust Deed as prescribed from time to time by [the] Council.

Per Lloyd's US Credit-for-Reinsurance PU TD 1999, §12, "American Reinsurance Policy" means:-

(a) any contract or policy of reinsurance (or any agreement to reinsure) incepting on or after August 1, 1995 (excluding all contracts or policies of reinsurance underwritten or any agreement to reinsure to be underwritten by the Underwriter as a member of the Syndicate under any binding authority incepting prior to that date and attaching on or prior to November 15, 1995) issued to a Ceding Insurer (as defined herein) (i) which is underwritten by the Underwriter as a member of the Syndicate on or after August 1, 1995, and (ii) which is allocable to the year of account of the Syndicate corresponding to the particular Trust Fund; and (b) any contract or policy of reinsurance (or any agreement to reinsure) underwritten on or after August 1, 1995 issued to a Ceding Insurer (as defined herein) in respect of which the Underwriter is liable as a member of the Syndicate for the year of account of the Syndicate corresponding to the particular Trust Fund to members of the same Syndicate or any other syndicate for an earlier year of account pursuant to any contract of Reinsurance to Close (as defined herein); but for the purposes of subparagraphs (a) and (b) above, excluding any contract or policy of reinsurance, the liabilities for which the Underwriter has provided security by means other than the Trust Fund.

³⁰⁰ *Per Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.2, "Ceding Insurers" means:-*

an insurer domiciled in a state, district, territory, commonwealth or possession of the United States which has ceded insurance risk underwritten by such insurer to one or more Underwriters pursuant to an American Reinsurance Policy[.]

³⁰¹ *Per Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.12, "Underwriters" means "underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representative or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt".*

³⁰² *See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.7 (the Council notifies the Trustee; in no event less than US\$104m); Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.7. *Per ibid.*, §1.23, "Trust Fund Minimum Amount" means:-*

an amount equal to the US Liabilities [as defined in *ibid.*, §1.24], provided, that if (a) such US Liabilities have been reinsured pursuant to any contract of Reinsurance to Close (as defined herein) with the Underwriter and/or one or more of the Other Underwriters as members of the same or another syndicate for a later year of account, and (b) in respect of each such reinsurer under that contract there is for that syndicate and that later year of account a trust fund constituted under this Deed or any other Lloyd's United States Situs Credit for Reinsurance Trust Deed which is at least equal in value to the trust Fund Minimum Amount for that trust fund in respect of that syndicate and year of account, the Trust Fund Minimum Amount shall be zero. For the avoidance of doubt, no assets of the Trust Fund may be transferred out of such Trust Fund to pay a Reinsurance to Close premium unless such transaction is with the Underwriter and/or one or more of the Other Underwriters who have a Lloyd's United States Situs Credit for Reinsurance Trust that satisfies the requirements of the Domiciliary Commissioner[.]

³⁰³ *Per Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.3, "Claim" means:-*

(i) a claim against one or more Underwriters by a Ceding Insurer, as defined above, for a loss under an American Reinsurance Policy excluding punitive or exemplary damages awarded against a Ceding Insurer and also excluding any extra contractual obligations not expressly covered by the American Reinsurance Policy; and/or (ii) a claim against one or more Underwriters by a Ceding Insurer for the return of unearned premium under an American Reinsurance Policy; both (i) and (ii) shall constitute a loss under an American Reinsurance Policy ("Loss")[.]

Per Lloyd's US Credit-for-Reinsurance PU TD 1999, §1.4, "Claim" means:-

(i) a claim against the Underwriter by a Ceding Insurer, as defined herein, for a loss under an American Reinsurance Policy excluding punitive or exemplary damages awarded against a Ceding Insurer and also excluding any extracontractual obligations not expressly covered by the American Reinsurance Policy; and/or (ii) a claim against the Underwriter by a Ceding Insurer for the return of unearned premium under an American Reinsurance Policy; both (i) and (ii) shall constitute a loss under an American Reinsurance Policy ("Loss").

³⁰⁴ *See the detailed provisions at Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.5 (definition of "Matured Claim") and *ibid.*, §2.3 (six conditions), and Lloyd's US Credit-for-Reinsurance PU TD 1999, §1.11 (definition of "Matured Claim") and *ibid.*, §2.3 (five conditions). The six conditions in Lloyd's US Credit-for-Reinsurance CU TD 1999 are broadly (*q.v.* for detailed provisions): (1) a "judgment" (arbitration award is not expressly mentioned) obtained by the Ceding Insurer against any Underwriter in any court of competent jurisdiction within the US, its territories and possession, in respect of that*

Each deals with (for example) duration of the trust fund;³⁰⁶ priority of claims;³⁰⁷ circumscription of the Ceding Insurer's rights against the trust fund;³⁰⁸ trust fund insufficiency;³⁰⁹ management of the trust fund;³¹⁰ treatment of trust fund income;³¹¹

Underwriter's liability under an American Reinsurance Policy (*ibid.*, §2.3(a)); (2) the judgment is final (*ibid.*, §2.3(b)); (3) the Trustee has been served with a certified copy (*ibid.*, §2.3(c)); (4) receipt (presumably by the Trustee) of a written sworn statement from the Ceding Insurer's lawyer that the Ceding Insurer has pursued all its rights and remedies against the relevant Underwriter under the Lloyd's American trust Deed, Lloyd's Central Fund United States Trust Deed, Lloyd's Central Fund United States Trust Deed (Number 2) and Lloyd's United States Situs Credit For Reinsurance Trust Deed or any replacement, and that the Claim is net of any amount recovered therefrom (*ibid.*, §2.3(d)); (5) similar receipt of a similar statement that (among other things) the Claim does not include punitive or exemplary damages or extracontractual obligations not expressly covered in the American Reinsurance Policy (*ibid.*, §2.3(e)), and (6) the expiry of thirty days from the date of service on the Trustee of the foregoing documents without the Trustee having received notice from the Council that the judgment has been satisfied (*ibid.*, §2.3(f)). There are the familiar extensive provisions as to what happens during those thirty days and who makes the determination that the Claim relates to liability under an American Reinsurance Policy, etc.: see *ibid.*, §2.3 after (f).

³⁰⁵ *Per* Lloyd's US Credit-for-Reinsurance CU TD 1999, §1.8, "Domiciliary Commissioner" means "the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered [*viz.*, New York: *ibid.*, fourth recital] identified on page one of this Trust Deed".

³⁰⁶ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.1(a) (five years from the date of the Council's written notice of the Trust's termination) and *ibid.*, §2.1(b) (sixty days after the Council has sent written notice to the Trustee that all Underwriters: (i) have become qualified and licensed to conduct a reinsurance business in all states where they have reinsurance in force; or (ii) have entered into an assumption and assignment agreement creating a novation that transfer all liability with respect to all risks covered by the Trust Fund to a reinsurer licensed to do an insurance business in such states; *q.v.* for detailed provisions). See similarly Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.1.

³⁰⁷ *Per* Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.2, the Trust Fund is exclusively available:-
first for the payment of all expenditures and fees under Paragraph 3.9 of this Trust Deed including legal fees and expenses actually incurred by or on behalf of the Trustee in connection with its administration, preservation or conservation of the Trust ("Trustee Priority Claims"); provided, however, that this amount shall not exceed \$4,000,000 or 4% of the value of the Trust, whichever is less. Any amount in excess of the amount necessary to satisfy Trustee Priority Claims shall be available for the payment of Matured Claims[.]

There are similar provisions at Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.2, under which "Trustee Priority Claims" limited to the trust's pro rata share, based on the aggregate value of all trust funds held under the deed for the Syndicate, of an amount equal to the lesser of US\$50,000 or 10% of that aggregate value.

³⁰⁸ *Per* Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.4:-

No Ceding Insurer shall have any right of any nature of description under this trust Deed to seek to enforce a Claim or otherwise bring an action against the Trustee in respect of any assets of the Trustee or of any assets other than those in the trust Fund, No Ceding Insurer, even after its Claim has become a Matured Claim, may require an accounting from the Trustee or inquire into the administration of the Trust, question any of the Trustee's acts or omissions or otherwise enforce this Trust Deed, the sole right of such Ceding Insurer under this Trust Deed being to receive the amount of its Claim after it has become a Matured Claim from the assets then in the Trust Fund and available for such payment under this Trust Deed[.]

See similarly Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.4.

³⁰⁹ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §4; *q.v.* for detailed provisions. See similarly Lloyd's US Credit-for-Reinsurance PU TD 1999, §5.

³¹⁰ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.6; Lloyd's US Credit-for-Reinsurance PU TD 1999, §§2.6, 4 ("administration and use of trust principal"), etc.

³¹¹ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.6 (income to be collected and paid by the trustee to the funds specified and in accordance with the provisions of the relevant part of *ibid.*); Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.6 (income to be collected and paid to the Overseas Fund as directed by the Agent not more frequently than monthly). And see *ibid.*, §1.8, definition of "Investment Income", *viz.*:-

the meaning from time to time given to the term "income" for trust accounting purposes by Section 11-2.1(b)(1) of the New York Estates, Powers and Trusts Law as from time to time amended, or any successor provision thereto[.]

the Trustee's obligation to certify trust fund assets³¹² and furnish information;³¹³ the Trustee's duties on termination of the trust fund;³¹⁴ and general matters concerning the Trustee's tenure, duties and entitlement to fees and expenses.³¹⁵ There are also familiar provisions protecting the Trustee from liability³¹⁶ and excluding any duty-interest conflict rules.³¹⁷

what is a "Matured Claim"?

- 4.43 A "Matured Claim" is, broadly,³¹⁸ a claim satisfying the following six conditions: (1) a Beneficiary has obtained, against a particular Underwriter — that is, a relevant party that is *not* Equitas Re personally — in respect of his liability under an American Policy — as to which fact there are specific provisions³¹⁹ — either a

On repatriation of income arising under Lloyd's US Credit-for-Reinsurance PU TD 1999, see Mkt. Bn. Y2005, March 3, 1999 ("Treatment of income arising on the US situs trust funds"). *Ibid.*, p.1:-

A recent review of how income earned of Lloyd's situs trust funds ... is collected ... has highlighted that it is not consistently treated Some managing agents repatriate income monthly, others repatriate quarterly whilst some do not repatriate it at all. The purpose of this bulletin is to reiterate that there is no 'right' approach; it remains a matter of choice for managing agents.

³¹² See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.12; Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.12.

³¹³ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.13; Lloyd's US Credit-for-Reinsurance PU TD 1999 has no exact equivalent.

³¹⁴ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §2.14; Lloyd's US Credit-for-Reinsurance PU TD 1999, §2.13. See also the definition of "US Liabilities" in *ibid.*, §1.24, *viz.*:-

the aggregate of the amount of gross liabilities of the Underwriter as a member of the Syndicate for a particular year of account under the American Reinsurance Policies as defined in subparagraph 1.2(a) and the amount in respect of which the Underwriter is liable under the American Reinsurance Policies as defined in subparagraph 1.2(b), but in each case excluding liabilities for which the Underwriter has provided security by means other than the Trust Fund.

³¹⁵ See generally Lloyd's US Credit-for-Reinsurance CU TD 1999, §3; Lloyd's US Credit-for-Reinsurance PU TD 1999, §3.

³¹⁶ See for example Lloyd's US Credit-for-Reinsurance CU TD 1999, §§2.3 after (f), 2.5(b), 2.6, 2.13(b), 2.14(a), 3.2 ("Trustee's duties and responsibilities shall be determined solely by the express provisions of this Trust Deed and no other duties or responsibilities shall be implied"), 3.3, 3.4, 3.5, 3.13 ("The Trustee shall not be liable for any of its actions or omissions hereunder (including any actions taken in accordance with Article 4), except for its own gross negligence of willful misconduct. If the Trust Fund is funded, in whole or in part, by a Letter of Credit issued by the Trustee or by an affiliate of the Trustee, the failure of the Trustee to draw against the Letter of Credit in circumstances where such draw would be required by this Trust Deed shall be deemed to be gross negligence and/or willful misconduct for purposes of this paragraph"), 3.16; Lloyd's US Credit-for-Reinsurance PU TD 1999, §§2.3 after (e), 2.5(b), 2.6, 2.12(c), 2.13(a), 3.2 ("The Trustee's duties and responsibilities shall be determined solely by the express provisions of this Deed of Trust and no other duties or responsibilities shall be implied"), 3.3, 3.4, 3.5, 3.6, 3.8, 3.11 ("The Trustee shall not be liable for any of its actions or omissions hereunder (including any actions taken in accordance with Article 5), except for its own gross negligence or willful misconduct. The Trustee shall be absolutely protected and shall incur no liability for any action or any failure to act taken by it in good faith and in the belief that such action or failure to act is in accordance with the terms hereof, except for an action or failure to act resulting from its own gross negligence"), 3.16.

³¹⁷ See Lloyd's US Credit-for-Reinsurance CU TD 1999, §3.15; Lloyd's US Credit-for-Reinsurance PU TD 1999, §3.15.

³¹⁸ See the detailed provisions at Lloyd's US Surplus-Lines CU Trust Deed, §2.3.

³¹⁹ The Trustee is entitled to rely on the Council's statement that the judgment or award does (or, presumably, does not) relate to liability under an American Policy: Lloyd's US Surplus-Lines CU Trust Deed, §2.3 after (f). If the Council does not notify the Trustee at least ten days before the expiry of the 30-day period, the judgment or award is deemed to relate to liability under an American Policy: *ibid.*, §2.3 after (f). If the Council determines that the judgment or award does *not* relate to liability under an American Policy, the Council must within ten days of the expiry of the 30-day period so notify the Trustee, who in turn must notify the "Domiciliary Commissioner" (as defined; per *ibid.*, §1.7, "Domiciliary Commissioner" means "the Chief Regulatory Officer for Insurance of the United States jurisdiction in which the Trust Fund is principally maintained and administered, identified on page one of this Trust Deed", *viz.*, New York), who

judgment from a court of competent jurisdiction within the US, its territories or its possessions, or a binding arbitration award;³²⁰ (2) such judgment or award is final;³²¹ (3) the Trustee has been served with a certified copy of the judgment or award, plus such proof of its finality as the Trustee may reasonably require;³²² (4) receipt, by an unspecified party (presumably³²³ the Trustee directly rather than indirectly), of a written sworn unqualified statement from the Beneficiary's lawyer that the Beneficiary has pursued all his rights and remedies against the relevant Underwriter under the Lloyd's American Trust Deed, Lloyd's Central Fund United States Trust Deed, Lloyd's Central Fund United States Trust Deed (Number 2), and Lloyd's United States Surplus Lines Trust Deed, or any replacement, and that the Beneficiary's Claim on Lloyd's US Surplus-Lines CU Trust Deed is net of the remaining unsatisfied after all recourse to the other trust funds has been "exhausted";³²⁴ (5) receipt, by an unspecified party, of a written sworn statement from the Beneficiary's lawyer that (among other things³²⁵) the Claim does not include exemplary or punitive damages or any extra-contractual obligation not expressly covered by the American Policy, and specifying any Unearned Premium component of the Claim;³²⁶ (6) the Trustee — which must "promptly" notify the Council of a Claim that the trustee has deemed to meet the foregoing conditions³²⁷ — has been served with the foregoing documents and has not received, within thirty³²⁸ days, notice from the Council that the judgment³²⁹ has been satisfied.³³⁰

"Insolvencies"

- 4.44** If the Trustee determines — relaying on the fund's most recent valuation³³¹ — that paying a Matured Claim would reduce the fund to below the "Trust Fund Minimum Amount" (as defined³³²), or if the Trustee had received notice that the Market has

makes his own conclusive determination, binding on "all parties", whether the judgment or award relates to liability under an American Policy: *ibid.* §2.3 after (f).

³²⁰ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(a).

³²¹ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(b). The judgment or award must have become:-
final in the sense that the particular litigation or arbitration has been concluded, either through failure to appeal within the time permitted therefor or through final disposition of any appeal or appeals that may be taken, the word "appeal" being used herein to include any similar procedure for review permitted by applicable law[.]

³²² Lloyd's US Surplus-Lines CU Trust Deed, §2.3(c).

³²³ Because see Lloyd's US Surplus-Lines CU Trust Deed, §2.3(f).

³²⁴ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(d).

³²⁵ See Lloyd's US Surplus-Lines CU Trust Deed, §2.3(e) for full provisions.

³²⁶ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(e).

³²⁷ Lloyd's US Surplus-Lines CU Trust Deed, §2.3 after (f); apparently in the wrong place.

³²⁸ Or whatever lesser period remains before the trust is terminated: Lloyd's US Surplus-Lines CU Trust Deed, §2.3(f). But see *ibid.*, §2.3 after (f): "The Council may at any time notify the Trustee if such claim has been satisfied prior to the expiration of the period set forth in subparagraph (e) above". "[S]ubparagraph (e)" is an error for "subparagraph (f)". It is not clear why this concession is not part of (f).

³²⁹ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(f) omits, presumably erroneously, mention of an arbitration award, on which see for example *ibid.*, §2.3(a)-(b).

³³⁰ Lloyd's US Surplus-Lines CU Trust Deed, §2.3(f).

³³¹ Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f).

³³² *Per* Lloyd's US Surplus-Lines CU TD 1999, §2.7, first sentence, "Trust Fund Minimum Amount" means, broadly (*q.v.* for detailed provisions), whatever amount — being or exceeding US\$104m — that the Council happens to notify in writing to the Trustee. The first sentence's wording is defective. The Council does not pass on to the Trustee a legal minimum level determined "by law": there is no such determination. Rather, determination of the Trust Fund Minimum Amount is by the Council itself, to

ceased trading,³³³ the trust deed's provisions on "Insolvencies"³³⁴ govern.³³⁵ If the Trustee does make such a determination, it must notify the IID, the Domiciliary Commissioner and the "Non-Domiciliary Commissioner" (as defined³³⁶).

Equitas American Trust Fund

generally

- 4.45** EATD is discussed in detail elsewhere.³³⁷ As a regulatory requirement, and as envisaged in *SOD*,³³⁸ Equitas Re must maintain trust funds "to ensure that ... its assets are available for policyholders in those jurisdictions; and ... Lloyd's can receive recognition for the Equitas reinsurance as an asset in solvency tests applied by overseas regulators". Funds held in the EATF are taken into account when assessing the solvency of the Lloyd's enterprise.³³⁹ The EATD was entered into on September 3, 1996 (the same day as RRCs 4 and 5) between: (1) Equitas Re and Equitas Ltd. as co-grantors; (2) Citibank as a trustee of all LATFs, as beneficiary; (3) Citibank as the then³⁴⁰ EATF trustee. The EquitasRe-assured-at-Lloyd's has no express right to payment out directly from the EATF.³⁴¹ The EATD appropriates, to one agglomerated dedicated EATF, relevant assets in each of the multitudinous relevant PU LATFs of each EquitasRe-reinsured SYA participant, in order to securitise, in accordance with the EATD, Equitas Re's RRC 4, §3 reinsurance obligations³⁴² and Equitas Ltd.'s RRC 5, §2 retrocession obligations³⁴³ in relation to relevant "American Business" (as defined³⁴⁴). Maintained in New York, governed by New York law³⁴⁵ and supervised by the New York Insurance Department,³⁴⁶ the EATF was funded by draining³⁴⁷ the LATFs of relevant EquitasRe-reinsured SYA

which extent "by law" is unnecessary and misleading: the Council has no legislative powers. The Council may amend that amount from time to time by providing the Trustee with written notice thereof, subject to the fund not falling below US\$104m: *ibid.*, second sentence. Where the Council does not notify the Trustee of a Trust Fund Minimum Amount, that amount is US\$104m.

333 See generally Lloyd's US Surplus-Lines CU TD 1999, §4.1.

334 Lloyd's US Surplus-Lines CU TD 1999, §4.

335 Lloyd's US Surplus-Lines CU TD 1999, §2.3 after (f). See the curious repetitive wording.

336 *Per* Lloyd's US Surplus-Lines CU TD 1999, §1.14, "Non-Domiciliary Commissioner" means:-
the Chief Regulatory Officer for Insurance other than the Domiciliary Commissioner in any state, territory, district, commonwealth or possession of the United States in which the Underwriters have Policyholders and who has provided the Trustee with written notice that he or she requires any notification required to be made to the Domiciliary Commissioner pursuant to this Deed of Trust[.]

337 See the annotated version, and textual discussion, at *Astor's Equitas Re Handbook*.

338 See generally *SOD*, p.100-1.

339 See for example *SOD*, p.100-101: "Equitas will be required to maintain certain overseas trust funds in order to ensure that: (a) its assets are available for policyholders in those jurisdictions; and (b) Lloyd's can receive recognition for the Equitas reinsurance as an asset in solvency tests applied by overseas regulators."

340 Brown Brothers Harriman Trust Co. is apparently the current EATF trustee.

341 *Cf.* LATD, §5.2; Lloyd's US Surplus-Lines CU Trust Deed, §2.3, Lloyd's US Credit-for-Reinsurance CU Trust Deed, §2.3.

342 See for example EATD, sixth and seventh recitals.

343 See for example EATD, eleventh recital.

344 See the definition of "American Business" at EATD, §1.

345 EATD, §14.

346 See for example EATD, §12(c)-(d). And see *SOD*, p.101 ("The EATF will be maintained in New York and will be governed by a deed which is being reviewed with, and for which approval is being sought from, the Superintendent of Insurance of the State of New York").

347 See *Astor's Equitas Re Handbook*, p.A192.

participants into the common EATF, and by the deposit into the EATF of assets from other sources.³⁴⁸ The EATD is integrated into the LATD: see for example EATD, definition³⁴⁹ and use³⁵⁰ of "Lloyd's American Trust Fund". EATD amendments must be approved by the Superintendent of Insurance of the State of New York.³⁵¹ The initiative to terminate the trust may come only from Equitas Re or Equitas Ltd.,³⁵² by serving a "Notice of Intention" accompanied by an appropriate report from one or more firms of independent actuaries concerning liabilities as at the report date.³⁵³

withdrawals; insufficiency

- 4.46** The EATF Beneficiary, Citibank NA, applies to the EATF Trustee, Brown Brothers Harriman Trust Co., to withdraw EATF monies when required by Equitas Re.³⁵⁴ The EATF Beneficiary then transmits that withdrawn money to itself as trustee of the particular relevant LATF of the particular liable EquitasRe-reinsured SYA participant,³⁵⁵ and disburses that money from that LATF at Equitas Re's direction. In the event of the EATD's insufficiency,³⁵⁶ the Trustee is required to notify the Superintendent of Insurance of the State of New York, and the latter is empowered to obtain a court order requiring the Trustee to transfer the trust fund's Assets to the Superintendent.³⁵⁷ If and when so transferred, the Superintendent must then apply the Assets in accordance with New York law relating to the conservation of insurance companies.³⁵⁸ Any resulting surplus must be transferred by the Superintendent to Equitas Ltd.³⁵⁹

THE FSA COMPENSATION SCHEME

orientation: recent application to some assureds-at-Lloyd's

- 4.47** The FSA has recently amended³⁶⁰ FSA Compensation Scheme Rules, effective October 15, 2003,³⁶¹ to somewhat avail private consumers and small³⁶² businesses

³⁴⁸ See *SOD*, p.101 ("As a condition of the New York Insurance Department's approval of the transfer of assets from the LATFs, to the EATF, Equitas has agreed to transfer additional assets into the EATF").

³⁴⁹ EATD, §1.

³⁵⁰ EATD, parties, recital [3], [4], [5], [6], [8], §1, §1 definition of "Beneficiary", "Name", §§3(a), 8, 12(a)(4)(a), 19.

³⁵¹ EATD, §18(b).

³⁵² See generally EATD, §13(a).

³⁵³ EATD, §13(a).

³⁵⁴ See for example *SOD*, p.101: "Citibank, as trustee of the LATFs, will exercise its rights as beneficiary of the EATF at the direction of Equitas (or its delegates) in Equitas' capacity as the run-off administrator for 1992 and prior business."

³⁵⁵ See for example *SOD*, p.101:-

Citibank, N.A. will serve as trustee of the EATF. Citibank will also be the beneficiary of the trust, but solely in its capacity as trustee of Names' LATFs. As beneficiary of the EATF and as trustee of the LATFs, Citibank will have the right to draw down funds in the EATF in order to pay Equitas' reinsurance payables to reinsured Names' LATFs. Once drawn down from the EATF and paid into the LATFs, the money will be used to pay the obligations of reinsured Names to their policyholders. ... In general, all money paid from the EATF will flow through Names' LATFs to policyholders.

³⁵⁶ See generally EATD, §12.

³⁵⁷ EATD, §12(b) and (c).

³⁵⁸ EATD, §12(d).

³⁵⁹ EATD, §12(d).

³⁶⁰ See historically CP 177, PS 177. On the FSA's former position, see (for example) CP 16, §141-147; PS 16, §77-82. *Ibid.*, §80: "In the light of respondents' comments, we have decided that the Central Fund can offer Lloyd's policyholders equivalent protection and there is currently not a strong case for giving them

insured at Lloyd's.³⁶³ The amendments — which do not cover reinsurance, confer no securitisation benefit specifically on any EquitasRe-assured-at-Lloyd's, do not substitute the FSA Compensation Scheme fund for the Central Fund, and contain various securitisation-relevant sub-text, including that the FSA apparently considers the Central Fund to be obligatory, not discretionary — do not relax any relevant pre-existing exclusions. In particular, Lloyd's Compensation Instrument does not broaden FSA Compensation Scheme Rules (alluded to below) concerning the *genus* of eligible claimants, contracts or maxima.³⁶⁴ Lloyd's Compensation Instrument addresses financial insecurity at Lloyd's at the level of individual SYA participant.³⁶⁵ If the latter is financially unstable — a fact best known in the BO at Lloyd's rather than routinely or immediately to the FSA — the FSA expects the Council to deploy, obligatorily, not discretionarily, the Central Fund to remedy any relevant cash call or other back-office funding deficiency. It is not irrelevant that the FSA continues to impose no obligation on any EquitasRe-reinsured SYA participant to maintain any funds in any jurisdiction for any purpose, and continues to fail to impose any obligation on the Council to actually use the Central Fund to remedy SYA-participant-level relevant defaults.³⁶⁶

the FSA Compensation Scheme Rules

orientation

- 4.48** The FSA Compensation Scheme Rules³⁶⁷ are set out in fourteen Chapters³⁶⁸ and six Schedules.³⁶⁹ The general rule is stated at FSA Compensation Scheme Rule

access to the new compensation scheme on a similar basis to policyholders of other authorised insurers. This decision will be kept under review." Having inquired into claims payment securitisation specifically at Lloyd's, it is perhaps significant that the FSA continues, in LLD, to (for example): (1) ignore the Council's purported distinction between the Old Central Fund and the New Central Fund; (2) disregard the purported New Central Fund Byelaw, §8 ringfence in which the Council seeks (arguably *ultra vires*) to prohibit itself from using New Central Fund money to pay EquitasRe-reinsured liabilities absent the consent of Members in Corporation general meeting; (3) make no distinction between EquitasRe-reinsured and any other insurance liabilities incurred at Lloyd's — all appear equally qualifying of full Central Fund indemnification. The Lloyd's enterprise has no proportionate cover plan facility of its own (*cf.* Equitas Re and Equitas Ltd.); (4) make no attempt to require the Council to amend relevant byelaw provisions which purport to make deployment of the Central Fund discretionary; (5) fail to clarify the *solus*' front-office recourse irrelevance; (6) fail to clarify the Lloyd's enterprise's personal liability for pre-contractual blandishments of superior securitisation, and the availability to assureds-at-Lloyd's of the Corporation's (other) personal assets (see Lloyd's Act 1911, s.7); (6) fail to make LLD, §3.2.1G prescriptive

³⁶¹ LLD, §8A.2.1D.

³⁶² For the substantial corporate assured-at-Lloyd's excluded from benefit under the FSA Compensation Scheme, Lloyd's Compensation Instrument will: (1) give some comfort that the FSA appears to consider the Council's claims payment securitisation use of the Central Fund to be obligatory, not discretionary; (2) remind it to monitor the Central Fund's continuing sufficiency. Query if Lloyd's Compensation Instrument will have a detrimental securitisation effect on excluded assureds-at-Lloyd's by pressurising the Council to prioritise the Central Fund in favour, paradoxically, of paying FSA Compensation Scheme beneficiaries; (3) remind it that there is no presently established third-party rescue fund once the Lloyd's enterprise has run out of money.

³⁶³ See Lloyd's Compensation Instrument; LLD, Ch. 8A ('Compensation arrangements for policyholders') read with COMP.

³⁶⁴ LLD is broadly contradictory to that extent: see for example *ibid.*, §§1.1.2G; 3.1.3G; 5.1.3G; 9.1.4G.

³⁶⁵ See the attempt at LLD, §8A.2.2G (note the FSA's continuing failure to distinguish between a Member and a SYA participant).

³⁶⁶ See for example LLD, §3.2.1.G, on which see ¶P13(8).

³⁶⁷ A general discussion FSA Compensation Scheme Rules is outside this work's scope.

³⁶⁸ *Viz.*, Chapters 1: 'Introduction and Overview'; 2: 'The FSCS'; 3: 'The qualifying conditions for compensation'; 4: 'Eligible claimants'; 5: 'Protected claims'; 6: 'Relevant persons in default'; 7:

§1.1.7G: 'The FSCS will only pay claims if a firm is unable or likely to be unable to meet claims against it because of its financial circumstances. If a firm is still trading and has sufficient financial resources to satisfy a claim, the firm will be expected to meet the claim itself'. The FSA Compensation Scheme pays out on direct insurance — never reinsurance — sold by a 'participant firm'³⁷⁰ which is 'in default', viz.: (1) a creditors' voluntary winding up resolution has been passed to wind it up; (2) a determination has been made by its Home State regulator that it appears unable to meet claims against it and has no early prospect of being able to do so; (3) a liquidator, provisional liquidator, administrator or interim manager has been appointed over it; (4) an order has been made by a court of competent jurisdiction for its winding up (if a company), dissolution (if a partnership), administration (company or partnership) or bankruptcy (if a natural person); or (5) 'approval' has been given for a company voluntary arrangement, partnership voluntary arrangement or individual voluntary arrangement.³⁷¹

net compensation payable

- 4.49** The FSA Compensation Scheme's administrator, Financial Services Compensation Scheme Ltd.,³⁷² must (generally) calculate the insurer's net liability in accordance with the terms of the insurance contract, and pay that amount to the claimant subject to prescribed maxima.³⁷³ Compensation is limited to 100% of the first £2,000 and 90% of the balance.³⁷⁴ 100% is paid for a 'protected claim' under a contract of compulsory insurance.³⁷⁵

excluded assureds

- 4.50** The FSA Compensation Scheme principally avails private consumers and small businesses: see generally for example FSA Compensation Scheme Rule 1.1.10G: 'By setting up the FSCS and making rules that allow the FSCS to provide compensation at a level appropriate for the protection of retail consumers and small businesses, the FSA enables consumers to participate in the financial markets with the confidence that they will be protected, at least in part, should the relevant person with whom they are dealing be unable to satisfy claims against it.'
- 4.51** Particular assureds excluded from the FSA Compensation Scheme include (for example): (1) a 'large company'; (2) a 'large mutual association'; (3) a 'large partnership';³⁷⁶ (4) a 'person' whose claim arises under Third Parties (Rights against Insurers) Act 1930;³⁷⁷ (5) any 'firm', 'overseas financial services institution', 'collective investment scheme' and³⁷⁸ any pension fund or 'retirement fund' —

'Assignment of rights'; 8: 'Rejection of application and withdrawal of offer'; 9: 'Time limits on payment and postponing payment'; 10: 'Limits on the amount of compensation payable'; 11: 'Payment of compensation'; 12: 'Calculating compensation'; 13: 'Funding'; 14: 'Participation by EEA Firms'.

³⁶⁹ *Viz.*, Sch. 1: 'Record-keeping requirements'; Sch. 2: 'Notification requirements'; Sch. 3: 'Fees and other required payments'; Sch. 4: 'Powers Exercised'; Sch. 5: 'Rights of action for damages'; Sch. 6: 'FSA Compensation Scheme Rules that can be waived'.

³⁷⁰ FSA Compensation Scheme Rule 6.2.1R(1).

³⁷¹ FSA Compensation Scheme Rule 6.3.3R(1)-(5).

³⁷² FSA Compensation Scheme Rule 1.1.5G; see generally FSA Compensation Scheme Rule 1.2 etc.

³⁷³ FSA Compensation Scheme Rule 12.4.10R

³⁷⁴ *Ibid.* and FSA Compensation Scheme Rule 10.2.3R(3).

³⁷⁵ FSA Compensation Scheme Rule 10.2.3R(1); FSA Compensation Scheme Rule 12.4.9R

³⁷⁶ There are some exceptions: see FSA Compensation Scheme Rule 4.3.4R.

³⁷⁷ There are some exceptions: see FSA Compensation Scheme Rule 4.3.5R.

³⁷⁸ There are some exceptions: see FSA Compensation Scheme Rule 4.2.2R.

unless a 'small business';³⁷⁹ (6) any government, central administrative authority or supranational institution; (7) any provincial, regional, local or municipal authority; (8) a 'director' or 'manager' of the 'relevant person in default'.³⁸⁰

excluded claims

- 4.52** Every claim is ineligible for indemnification out of the FSA Compensation Scheme other than one made under a 'protected contract of insurance',³⁸¹ viz., broadly, one where the situs of the risk is within the EU,³⁸² and which is not reinsurance.³⁸³

timing

- 4.53** If the Scheme administrator decides that it is not reasonably practicable or appropriate to make, or continue to make, arrangements to secure appropriate continuity of insurance,³⁸⁴ or that it would not be appropriate to take, or continue to take, appropriate measures to safeguard policyholders of an insurance undertaking in financial difficulties,³⁸⁵ it must pay compensation 'as soon as reasonably possible'.³⁸⁶ The FSA Compensation Scheme Rules permit payment to be delayed in the case of a claim relating to a protected contract of insurance if it considers that the liability to which the claim relates is covered by a contract of insurance with a solvent insurance undertaking, or where it appears that a person other than the insurer's liquidator may make payments or take such action to secure the continuity of cover as the Compensation Scheme would undertake.³⁸⁷

Sub-Chapter 2: the Central Fund

ORIENTATION

scope of sub-chapter

- 4.54** The Central Fund is discussed in detail elsewhere.³⁸⁸ Absent statute and case law on the use of the Central Fund in not-BBSN circumstances, it is appropriate to provide a short summary description, from which arguments and conclusions may be

³⁷⁹ FSA Compensation Scheme Rule 4.3.3(1)R.

³⁸⁰ There are some exceptions: see FSA Compensation Scheme Rule 4.2.R(7). For relevant provisions, see generally FSA Compensation Scheme Rule 4.2.1R *et seq.*, especially FSA Compensation Scheme Rule 4.2.2R (summary of excluded assureds), FSA Compensation Scheme Rule 4.3.3 *et seq.* (the particular class of 'eligible claimants' in relation to 'relevant general insurance contracts'), and FSA Compensation Scheme Rule 4.3.6R (claims in relation to compulsory insurance)

³⁸¹ FSA Compensation Scheme Rule 5.4.1R; see also FSA Compensation Scheme Rule 5.4.5 for transitional provisions.

³⁸² See the detailed provisions at FSA Compensation Scheme Rule 5.4.2R(1), FSA Compensation Scheme Rule 5.4.3, FSA Compensation Scheme Rule 5.4.4, etc.

³⁸³ FSA Compensation Scheme Rule 5.4.2R(4); see also the tautologous overlap at FSA Compensation Scheme Rule 5.4.2R(3), definition of 'relevant general insurance contract'.

³⁸⁴ FSA Compensation Scheme Rule 3.2.1(4)(a); see generally FSA Compensation Scheme Rule 3.3.1R.

³⁸⁵ FSA Compensation Scheme Rule 3.2.1(4)(b); see generally FSA Compensation Scheme Rule 3.3.3R.

³⁸⁶ FSA Compensation Scheme Rule 9.2.1R.

³⁸⁷ FSA Compensation Scheme Rule 9.2.2R(3).

³⁸⁸ *Viz.*, at *Astor's Law of Lloyd's*, 2nd Ed.

drawn, of certain BBSN-state aspects of the Central Fund.³⁸⁹ In not-BBSN circumstances, an urgent need is likely to arise for (and to freeze the Central Fund pending) statutory or judicial clarification of custody, control, use, and ownership issues, and to remove the discretions of the Council and Members in Corporation EGM.

generally

assured's-at-Lloyd's due diligence

- 4.55 In BBSN and not-BBSN circumstances alike, the prospective assured-at-Lloyd's will wish to perform due diligence on the nature, governance, sufficiency and availability of the Central Fund.

historically; regulatory basis

- 4.56 The multi-purpose homogenous Central Fund,³⁹⁰ a not-dedicated³⁹¹ CU deficit-remedying³⁹² fund — recourse to which suggests one or more of a number of types of self-regulatory failure³⁹³ — is not required by Lloyd's Acts 1871-1982³⁹⁴ (private Acts akin³⁹⁵ to a memorandum and articles of association, principally of BO effect not binding on third parties outside the Corporation's purview or the Council's self-regulatory jurisdiction, including assureds-at-Lloyd's) or by any other external regulatory instrument.³⁹⁶ Lloyd's Act 1982, Sch. 2 does not³⁹⁷ expressly mention the Central Fund by name in its extensive list of byelaw subjects. The Central Fund

³⁸⁹ The main text is only a cursory description and not intended to replace the discussion at *Astor's Law of Lloyd's*, 2nd Ed.

³⁹⁰ See for example *Lloyd's v Clementson* {1a} [1995] LRLR 307 (Saville J); *ibid.*, {1b} [1995] LRLR 307 (CA); *Lloyd's v Clementson* {2} [1997] LRLR 175 (Cresswell J); *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA); *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J); *ibid.*, {2b} [2002] EWCA Civ. 1101 (CA).

³⁹¹ Cf. CFUS 2, which is a dedicated CU fund.

³⁹² On the possibility of a new scheme for using the Central Fund as a first, rather than last, resort, see for example *Cromer WP*, §64 (p.17):-

At present the Central Fund ... can be called upon, after the member has exhausted his deposits, reserves and his private means. The new arrangement might be regarded as bringing forward the Central Fund to be used before, instead of after, the private means of the member.

Out of this idea, rejected by *Cromer WP* (*ibid.*, §65, p.17) apparently evolved Central Fund earmarkings following exhaustion of reserves and the Lloyd's Deposit.

³⁹³ For example: (1) to timeously monitor the relationship between premium income and ultimate net liability (negligent underwriting); (2) to ensure that FAL are sufficient to cover the Member's Participation Liabilities (including a failure to build up personal reserves to meet monitored or unquantified ultimate net liabilities — looked at another way, the Member's members' agency's failure to anticipate results of its portfolio selection, or failure by the managing agency to give the members' agency sufficient warning); (3) to ensure that the Member's other relevant assets are sufficiently proximate.

³⁹⁴ But see Lloyd's Act 1911, Schedule ("Corporation of Lloyd's revenue account of underwriters' guarantee fund"), and the inferences at Lloyd's Act 1982, s.15(1)(b) and Schedule 2, §§(1) and (4). Historically, see *Fisher WP*, §24.16 (p.144-5) and *ibid.*, §24.15 (p.144).

³⁹⁵ See *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176, 182 (QB Div. Ct.).

³⁹⁶ *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (Bingham MR; "Lloyd's were unable to point to any national legislation which required that the Central Fund should be established in the way or on the terms it was. It was Lloyd's which adopted the Central Fund Byelaw and Lloyd's which operated the Central Fund. If the Secretary of State had any relevant reserve powers, it is not suggested that he exercised them."). See *Lloyd's v Clementson* {2} [1997] LRLR 175, 197 etc. (Cresswell J); and see LLD, Ch. 3.

³⁹⁷ And see the then Deputy Chairman of Lloyd's April 8, 1981 letter (registered number 2169), indicating that what became Lloyd's Act 1982, Sch. 2, §(1) was partly drafted with the May 18, 1927 Central Fund Agreement in mind.

was created further to the May 18, 1927³⁹⁸ Central Fund Agreement (as was amended from time to time³⁹⁹), the instrument (not insignificantly) being imposed on Members by self-regulators-at-Lloyd's (*cf.* promulgated by Members by consensual⁴⁰⁰ byelaw). That agreement was repealed and replaced by OCFB;⁴⁰¹ and

³⁹⁸ Not irrelevant preceding litigation was *Industrial Guarantee Corporation, Ltd. v Lloyd's* (1924) 19 Lloyd's List Law Reports 78 (Bailhache J).

³⁹⁹ See latterly for example the then Deputy of Chairman of Lloyd's March 23, 1983 market letter:-
Summary of amendments to be made to the central fund agreement — '1. Provision to be made for an increase in the present maximum levy of .45% of premium income, the amount of which has yet to be agreed. 2. Future amendments In the Agreement to be effected by bye-law. 3. A provision to be included under which withdrawals from the Fund to pay amounts lawfully due from a Member, establish a debt by the Member to the Fund. 4. A bye-law to be made requiring Members to consent to the amendments and authorising their Underwriting Agents to testify that consent by signing a Supplemental Deed.'

⁴⁰⁰ See generally the then extant Lloyd's Act 1871, s.24.

⁴⁰¹ See historically for example the then Chairman of Lloyd's July 15, 1986 market letter (registered number 0722):-

At its meeting yesterday, the Council of Lloyd's passed the Central Fund Byelaw a copy of which I am sending herewith. The new Byelaw will replace the Central Fund Agreement dated 18 May 1927 as the instrument governing the levying, administration and application of Lloyd's Central Fund. The Byelaw is the culmination of a lengthy process of review which started in response to the recommendations of the Fisher Working Party on Self-Regulation at Lloyd's published in May 1980 and about which a letter was written to the market in March 1983. The Central Fund was set up primarily, but not wholly, for the purpose of making discretionary payments in satisfaction of policyholders' valid claims where Names were unable or were unwilling to meet them. The Fund was constituted by the 1927 Central Fund Agreement to which all new Names have been required to agree to adhere and has been administered by the Society of Lloyd's pursuant to that Agreement. As Fisher recognised, the scheme of the Agreement is ill-adapted to modern circumstances in which claims are in practice paid by managing agents from the various syndicate funds at their disposal and the managing agents are reimbursed directly or indirectly out of the Central Fund. Many technical difficulties have arisen which could not satisfactorily be resolved. Clauses limiting the maximum level of contributions and requiring that a Name be declared in default before claims on policies written by him can be paid create severe obstacles to the effective administration of the Fund in the best interests of policyholders and members of the Society as a whole. The language of the Agreement is obscure and archaic and Queen's Counsel have advised that the Agreement be revoked by the Council in accordance with its terms and that the Central Fund be constituted by a Byelaw governing its administration.

The Fisher working Party recommended (*inter alia*) that the Council of Lloyd's should be given express powers to maintain the Central Fund, to decide (and alter from time to time) the purposes to which the Fund may be applied, to require Names to contribute to it, and to fix the rate of contributions and alter it from time to time. Fisher also recommended that the Council should review the provision that money in the Fund may not be applied in payment of claims on policies underwritten by a Name until he has been declared in default.

The Task Group set up by Lloyd's to consider the recommendations of the Fisher Report recommended (*inter alia*) that: (i) Names should be required as a condition of membership of Lloyd's to consent to a variation of the Central Fund Agreement: (a) removing the maximum contribution limit of 0.45% of premium income and empowering the Council by regulation to levy contributions at rates to be determined; (b) removing the proviso against increasing the financial liability of Names; (c) enabling future modification or variations to the Agreement to be effected by Byelaw rather than by unilateral deed; (ii) the Agreement should be amended to allow payment of claims without a declaration of default where Names subscribing a risk cannot be identified; (iii) the Council should be empowered to remove the default declaration provision altogether; (iv) a Byelaw should require all Names to subscribe to the Central Fund.

The Council considered the Task Group recommendations and on 25 March 1983 Mr. Frank Barber, Deputy Chairman of Lloyd's, wrote to all Underwriting Agents and Panel Auditors that the Council had decided to make provision for an increase in the maximum levy of 0.45% of premium income to an amount which was yet to be agreed, to effect future amendments to the Agreement by byelaw, to amend the Agreement so as to include a provision under which withdrawals from the Fund to pay amounts lawfully due from a Name establish a debt by the Name to the Fund, and to enact a byelaw requiring Names to consent to the amendments and authorizing their Underwriting Agents to testify such consent by signing a Supplemental Deed.

As work by the Corporation's staff and its external legal advisers proceeded it became increasingly clear that the Agreement should be entirely revoked and the Central Fund constituted anew by Byelaw. The Inland Revenue have now confirmed that the proposed changes will not have adverse tax consequences and after consultation within the market the Council has decided that the Agreement should be revoked and replaced by the new Byelaw.

see now also NCFB, which purports to create a separate (and supposedly 'ringfenced') 'New' Central Fund; LLD, though recognising EquitasRe-reinsured liabilities,⁴⁰² makes no distinction between the Old Central Fund and the New Central Fund.⁴⁰³ The Central Fund remains contractual and consensual in nature, essentially a BO arrangement between the Corporation and Members to which no assured-at-Lloyd's is privy. The FSA's present regulatory essay does not attempt to impose any obligation on any part of the Lloyd's enterprise to provide or maintain any Central Fund.⁴⁰⁴

Old Central Fund introduced

- 4.57 The Old Central Fund is governed by the OCFB, promulgated⁴⁰⁵ by the Council further to Lloyd's Act 1982, s. 6(2),⁴⁰⁶ *ibid.*, Sch. 2, §§ (1)⁴⁰⁷ and (4)⁴⁰⁸ and Lloyd's

Turning now to the provisions of the new Byelaw, paragraph 4 empowers the Council to prescribe the amount of the annual contribution and the manner of calculating such amount. The Council will within the next few months decide the contribution rate for 1986. contribution rates have to be fixed by special resolution, which ensures the fullest representation of external Names. The Council is also empowered, if it should be necessary, to levy additional contributions in any year. In addition, paragraph 5 gives the Society power to increase the Fund at short notice by borrowing for it. Like the Agreement, the Byelaw requires Names to furnish information necessary for the administration of Central Fund. Paragraph 4 (11) empowers the Committee of Lloyd's to require a Name who refuses to pay his contribution to cease underwriting. Paragraph 7 of the new Byelaw sets out the purposes for which the Central Fund's assets may be used. Although its primary purpose is the protection of policyholders, money out of the Central Fund can, as always under the Agreement, be applied for any purpose where in the opinion of the Council it is expedient for the advancement and protection of the interests of the Names in connection with their underwriting business. Paragraphs 8 and 10 of the new Byelaw re-enact the provisions of Byelaw No. 2 of 1985 (Recovery of Monies) which empowered Lloyd's to apply monies out of the Society's general funds other than the Central Fund for purposes akin to those of the Central Fund, and to recover from Names monies paid out of the Central Fund or from the general funds of the Society in connection with the underwriting liabilities of those Names. The recovery provision is an integral part of the Central Fund arrangements and reserves the fundamental principle that Names underwrite "each one for his own part". The new Byelaw thus implements the recommendations of the Fisher Report and is designed to remove the various difficulties arising from the anachronistic terms in which the Central Fund arrangements have hitherto been cast.

And see generally *Fisher WP*, §24.13-24.16 (p.144-5), *ibid.* §24.13 (p.144), describing the now obsolete May 18, 1927 "Agreement constituting the Central Fund" and subsequent amending measures (all now replaced by Byelaw 4 of 1986 (as amended)). *Ibid.* recommended that the Council should review: (1) the purpose for which Central Fund monies may be used: *ibid.*, §24.16(a) (p.144); (2) the investment of Central Fund monies in the light of the purposes for which they may be required: *ibid.*, §24.16(b) (p.144); (3) the provision in the agreement that Central Fund monies may not be applied to pay claims on policies underwritten by a Name until he has been declared in default: *ibid.*, §24.16(c) (p.145); (4) the rates of contribution and the procedure for increasing contributions in case of need: *ibid.*, §24.16(d) (p.145); (5) the practice in relation to the formalities required for adherence to the agreement *ibid.*, §24.16(a) (p.144); *ibid.*, §24.16(e) (p.145). On the relevance to OCFB's promulgation of what became Financial Services Act 1986, see for example, the then Chairman of Lloyd's December 5, 1985 market letter, p.2 (typical of the tone of self-regulators-at-Lloyd's of the time):-

I conclude that any argument for bringing Lloyd's within the scope of the new Financial Services Bill is refuted by the action we have taken under the new Lloyd's Act. The protection to be conferred upon the investor by the proposed Bill is of no relevance to the Lloyd's policy-holder who is protected by the chain of security behind the Lloyd's policy. The Member of Lloyd's is protected by the range of Byelaws passed under the new Lloyd's Act.

On the real-life (*cf.* self-regulators'-at-Lloyd's represented) efficacy of the latter protection, see (for example) R&R *passim* and relevant evidence at (for example) *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J) and *ibid.*, {2b} [2002] EWCA Civ. 1101 (CA); *Treasury Sel. Comm. 1, passim*.

⁴⁰² See for example LLD, §12.3.3(4)R.

⁴⁰³ See FSA Glossary, definition of "Central Fund": "the Central Fund established under Lloyd's Central Fund Byelaw (No 4 of 1986) and the New Central Fund established under Lloyd's New Central Fund Byelaw (No 23 of 1996). Historically, see for example CP 66, §4.25, fn. 5 ("the Central Fund and New Central Fund ...").

⁴⁰⁴ LLD, §3.2.1G is self-evidently not a rule.

⁴⁰⁵ See preamble, OCFB.

⁴⁰⁶ Lloyd's Act 1982, s.6(2):-

Act 1911, s.7.⁴⁰⁹ It commenced July 15, 1986⁴¹⁰ and replaced the Central Fund Agreement, May 18, 1927.⁴¹¹ The OCFB provides that the Corporation (apparently error for the Council) is to "hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the Central Fund"⁴¹² and levy contributions from Members.⁴¹³ The Old Central Fund comprises the relics of assets of the 1927 Central Fund,⁴¹⁴ Members' contributions formerly levied annually by the Corporation;⁴¹⁵ ⁴¹⁶ (and which are now the subject of RRC 1 express releases); certain money borrowed by the Corporation;⁴¹⁷ ⁴¹⁸ relevant investments;⁴¹⁹ investment income;⁴²⁰ reimbursement recoveries,⁴²¹ and other accretions.⁴²²

The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and (b) amend or revoke any byelaw made or deemed to have been made hereunder.

⁴⁰⁷ Lloyd's Act 1982, Sch. 2, §(1) ("For regulating the admission to the Society of members as either underwriting members or non-underwriting members, for regulating continuing membership of the Society and for regulating the manner and circumstances in which members may be excluded from membership of the Society, and so that any byelaws made for such purposes may impose or provide for conditions and requirements to be satisfied or complied with on admission or during membership, which conditions and requirements — (a) may from time to time be added to, altered or withdrawn; (b) may include the requirement to give undertakings; (c) may apply to all or any class of underwriting members and as to the whole or any class of their underwriting business; and (d) may be imposed notwithstanding any inconsistency therein with any contract subsisting at the commencement of this Act between the Society and any member of the Society: Provided that, without prejudice to the powers of the Council to require an underwriting member to cease or reduce the level of his underwriting at Lloyd's, a member of the Society shall not be excluded from membership for breach of a byelaw or failure to satisfy a condition, requirement or undertaking where such breach or failure consists solely of his inability to satisfy a financial qualification contained in such byelaw, condition, requirement or undertaking, which was not applicable on the date he became an underwriting member or where he has subsequently increased the level of his underwriting, on the date his application to do so was accepted").

⁴⁰⁸ Lloyd's Act 1982, Sch. 2, §(4) ("For regulating the fees, subscriptions and other sums to be paid by members of the Society, annual subscribers, associates, Lloyd's brokers, underwriting agents and others").

⁴⁰⁹ See Appendix II.

⁴¹⁰ OCFB, §12.

⁴¹¹ Old Central Fund Byelaw, Explanatory Note. Historically, see *Fisher WP*, §24.13-24.16 (p.144-5), *ibid.* §24.13 (p.144), describing the now obsolete May 18, 1927 "Agreement constituting the Central Fund" and subsequent amending measures (all now replaced by Byelaw 4 of 1986 (as amended)). *Ibid.* recommended that the Council should review: (1) the purpose for which Central Fund monies may be used: *ibid.*, §24.16(a) (p.144); (2) the investment of Central Fund monies in the light of the purposes for which they may be required: *ibid.*, §24.16(b) (p.144); (3) the provision in the agreement that Central Fund monies may not be applied to pay claims on policies underwritten by a Name until he has been declared in default: *ibid.*, §24.16(c) (p.145); (4) the rates of contribution and the procedure for increasing contributions in case of need: *ibid.*, §24.16(d) (p.145); (5) the practice in relation to the formalities required for adherence to the agreement *ibid.*, §24.16(a) (p.144): *ibid.*, §24.16(e) (p.145). Evolution of the Central Fund is summarised in *Lloyd's v Clementson* {2} [1997] LRLR 175, 210-213 (Cresswell J). On the Central Fund's regulatory shortcomings as alleged by a defendant Member, see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 224 *et seq.* (Cresswell J).

⁴¹² OCFB, §2(a).

⁴¹³ OCFB, §2(b).

⁴¹⁴ OCFB, §3(a).

⁴¹⁵ Byelaw 4 of 1986, §3(b) and see *ibid.*, §4.

⁴¹⁶ OCFB, §3(b). See generally *ibid.*, §4. Contribution amounts are as prescribed by Council special resolution (*ibid.*, §4(2)) and payable on such date(s) as prescribed by *ditto* (*ibid.*, §4(3)). The Council has empowered itself to exempt by special resolution any Member or class of Member from such contributions (*ibid.*, §4(6)), generally or particularly (*ibid.*, §4(7)). Due payment is a condition of permission to sell insurance at Lloyd's (*ibid.*, §4(11)). Defaulted contributions carry interest (*ibid.*, §6A).

⁴¹⁷ OCFB, §3(c). *Ibid.*, §5 empowers the Corporation to borrow from time to time, as assets of the Central Fund, "monies in such amounts as are in the opinion of the Council desirable".

New Central Fund introduced

- 4.58** The New Central Fund⁴²³ is governed by the NCFB, promulgated⁴²⁴ by the Council further to Lloyd's Act 1982, s.6(2), *ibid.*, Sch. 2, §(1) and (4), and Lloyd's Act 1911, ss.7 and 9.⁴²⁵ It allegedly replaces⁴²⁶ the Old Central Fund,^{427 428} but the Old Central Fund Byelaw does not appear to have been revoked and the Old Central Fund appears to subsist. The New Central Fund comprises underwriting Members' annual, callable and special contributions;⁴²⁹ relevant money borrowed by the Corporation;⁴³⁰ reimbursement recoveries;⁴³¹ other relevant recoveries;⁴³² any other fund accretions;⁴³³ fund investments;⁴³⁴ and investment income.⁴³⁵ The New Central Fund is apparently insured.⁴³⁶

liability; liabilities in practice

- 4.59** The essence of an insurance contract is the assured's right to full payment, not a right to the insurer graciously considering whether, and if so how much, to pay.⁴³⁷ In blandishments, self-regulators-at-Lloyd's nowhere appear to indicate that the

418 Byelaw 4 of 1986, §3(c) and see *ibid.*, §5. The Corporation has power to borrow: Lloyd's Act 1951, s.3 (as amended by Lloyd's Act 1982, Schedule 3).

419 OCFB, §3(d). On Old Central Fund management and investment, see *ibid.*, §6.

420 OCFB, §3(e).

421 OCFB, §3(f); *ibid.*, §§10(1)(a); 10A(5) and (6).

422 OCFB, §3(g).

423 NCFB, §2: "The Society shall establish, hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the New Central Fund."

424 See NCFB, preamble.

425 Lloyd's Act 1911, s.9.

426 NCFB, §2: "The Society shall establish, hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the New Central Fund."

427 NCFB, Explanatory Note: "This byelaw provides for the establishment of a New Central Fund in succession to the Central Fund held under the Central Fund Byelaw (No. 4 of 1986)."

428 NCFB, Explanatory Note: "This byelaw provides for the establishment of a New Central Fund in succession to the Central Fund held under the Central Fund Byelaw (No. 4 of 1986)."

429 NCFB, §3(a); on contributions, see *ibid.*, §4.

430 NCFB, §3(b); on relevant borrowing by the Corporation, see *ibid.*, §6, which empowers the Corporation to borrow money at any time secured on the Corporation's assets.

431 NCFB, §3(c); on relevant recoveries, see the detailed provisions at *ibid.*, §11.

432 NCFB, §3(d); *viz.*, funds recovered under *ibid.*, §12(1) and transferred to the New Central Fund under *ibid.*, §12(5).

433 NCFB, §3(e).

434 NCFB, §3(f). On fund investing, see *ibid.*, §7.

435 NCFB, §3(g).

436 And see *NAIC Review 1999:-*

[p.17] Central Fund Insurance — In late April 1999, Lloyd's announced that it had arranged a layer of insurance to protect the Central Fund. The policy, which is effective for each of the next five years (1999 through 2003), has an annual attachment point of £100 million (\$166m), an annual limit of £350 million (\$582m) and an aggregate maximum limit over the five-year period of £500 million (\$830m). The coverage is provided by the six insurers listed below. Swiss Re - Employers Re — The St. Paul Companies — Hannover Re — XL Mid Ocean Re — Chubb Corp[.] [p.49] The new Central Fund insurance has added a large extra layer of protection to the Central Fund, greatly strengthening the fund for at least the next five years.

437 *Hampton v Toxteth Co-operative Ltd.* [1915] 1 Ch 721 (CA); *Medical Defence Union Ltd. v Department of Trade* [1979] 1 Lloyd's Rep. 499, 506 (Megarry V-C; "Where a person insures, I think that he is contracting for the certainty of payment in specified events, and not merely for the certainty of proper consideration being given to his claim that a discretion to make a payment in those events should be exercised in his favour.")

Central Fund might not be sufficient to pay a valid claim 100%. no reference appears to be made in blandishments to a level of indemnification approaching the 90% available under the FSA Compensation Scheme. The notion of mere 90% recourse by analogy to the current FSA Compensation Scheme (and the previous, now obsolete Policyholders Protection Act 1975 scheme) appears never to have been publicly ventured by self-regulators-at-Lloyd's in any of its blandishments (some of which recently suggest all or nothing; presumably these blandishments are not wholly without legal consequences). The liability of the Central Fund has been recognised to be unlimited.⁴³⁸ The Central Fund exists to pay in full one category of liability above whatever others the Council may have articulated, viz., a SYA participant's insurance liabilities. The Central Fund does not have its own inherent, express or implied proportionate payment plan. The effects of a relevant insufficiency at Lloyd's were examined by self-regulators-at-Lloyd's during R&R deliberations and elsewhere in the R&R context.

utility

- 4.60** The Central Fund — extensively utilised (not always accurately) in self-regulators'-at-Lloyd's blandishments⁴³⁹ to actual and prospective assureds-at-Lloyd's — is taken into account by external insurance regulators in various jurisdictions (not least the US⁴⁴⁰) and utilised for various external insurance regulatory purposes such as the solvency of the Lloyd's enterprise as a whole, an issue principally between the Council and Members for the time being, on which specific point the FSA does not promulgate any relevant rules.⁴⁴¹ The Central Fund has been regarded⁴⁴² by the UK government as the Lloyd's enterprise's own compensation scheme.

⁴³⁸ *Cromer WP*, §59 (p.16):-

No one has suggested that, under limited liability, a member should be left on his own and that default on a Lloyd's policy would be regarded as a possibility, however remote. If that is so, there must be an unlimited liability somewhere and in practice that could only be placed on the shoulders of the members of Lloyd's as a whole. The more than the individual name is relieved of his unlimited liability, the more it must fall on his fellow names. Of course deposits can be increased and reserve funds built up, but if Lloyd's remain determined to ensure that all Lloyd's policies are honoured, then the limited liability of a name must mean that other names will have to come to his assistance before he has exhausted his private means. If default happened only in isolated cases, this might not be a serious burden on the general body of names - but, if the whole of a market becomes unprofitable or the less efficient syndicates lost money through the markets, it is not obvious that the remainder of the names would be willing to pay out what might be substantial sums.

⁴³⁹ See mention of the Central Fund at (for example) *Chain of Security 2000.*; *Chain of Security 2002*; *Chain of Security (RA 2001) 2002*; *Chain of Security 2003*; *Chain of Security 2003 US*; *Chain of Security (RA 2002) 2003*; *Security at Lloyd's 2000*; *Security at Lloyd's 2001*; *Security at Lloyd's 2001 (short)*, and the various similar passages in Corporation RAs.

⁴⁴⁰ See CFUS 1 and CFUS 2.

⁴⁴¹ LLD §3.2.1G is "guidance", not a rule.

⁴⁴² See for example *Hansard*, House of Lords, Cols. 312-313, February 12, 1997, Policyholders Protection Bill, 2nd reading; Viscount Chelmsford:-

The Bill makes a number of amendments to the Policy Holders Protection Act 1975. That Act provides a system of compensation to certain policyholders of failed insurance companies. Before providing your Lordships with details of the proposed amendments, I should explain how the compensation scheme works. The scheme is administered by the Policyholders Protection Board. If an insurance company fails and goes into liquidation, the board is required to compensate policyholders who are holders of "United Kingdom policies" as defined in the Policy Holders Protection Act. In relation to general business policies the protection is 100 per cent. in the case of compulsory insurance requirements, such as third party motor cover. Other claims are protected to the extent of 90 per cent. provided the policyholder is a private individual, including private individuals as members of partnerships. In relation to long term business the board is required to try to secure continuity of cover so that 90 per cent. of the future benefit of the policy is protected. If this proves impossible, the board is required to pay a sum equal to 90 per cent. of the value of the policy in the liquidation. I should add that marine, aviation and transport insurance and reinsurance business is not covered by the Act. Nor is Lloyd's of London, which has its own compensation scheme.

how many Central Funds?

- 4.61** There appears to be no legal objection in principle to the Council creating a number of genuine Central Funds (*viz.*, for example, CFUS 1⁴⁴³ and 2 specifically to securitise US assureds-at-Lloyd's). Self-regulators-at-Lloyd's appear to maintain two so-called Central Funds, the "Old" and the "New", a distinction apparently not recognised by the FSA. Each has a different governing byelaw,⁴⁴⁴ and somewhat different accounts and expressly permitted objects. The distinction (apparently not recognised by the FSA) rests on questionable legal authority, there being no law expressly permitting the Council to create an underclass of assured-at-Lloyd's for any purpose including claims payment securitisation. To the extent that the New Central Fund is expressly not ordinarily available to pay EquitasRe-reinsured liabilities and no other properly called Central Fund exists for that purpose, "Central Fund" is inappropriate. To the extent that there is a restriction in the Central Fund about paying a certain class of claim — thereby creating surreptitiously an underclass of assured-at-Lloyd's — it is arguably *ultra vires*.

who owns the Central Fund?

- 4.62** The Council⁴⁴⁵ and FSA⁴⁴⁶ consider, arguably erroneously, that the Central Fund forms an undifferentiated⁴⁴⁷ part of the Corporation's personal assets. If correct, there may be important self-regulatory consequences.

sufficiency

- 4.63** Though actual exhaustion of the Central Fund (whether through self-impoverishment or otherwise) would lead to the collapse of the Lloyd's enterprise,⁴⁴⁸ it is difficult to speak prospectively of its insufficiency or insolvency given the Council's apparent discretion over what liabilities (if any) to discharge in the first place. In any event, the extent of the Council's obligations to ensure a

⁴⁴³ CFUS 1 was set up in June 1992 out of profits held in the LATF. See (for example) *NYID Report 1995*, p.15:-

CFUS was established in July 1992 in the amount of \$700,061,719 by means of a special levy by Lloyd's against Names. This amount was transferred from LATF to CFUS and represented a portion of Names' underwriting profits on closed years of account held in LATF.

⁴⁴⁴ See OCFB and NCFB.

⁴⁴⁵ See for example OCFB, preamble ("The Council of Lloyd's in exercise of its powers under section 6(2) and paragraphs (1) and (4) of schedule 2 of Lloyd's Act 1982 and section 7 of Lloyd's Act 1911 (as amended)"). See similarly NCFB, preamble ("The Council of Lloyd's in exercise of its powers under section 6(2) of, and paragraphs (1) and (4) of Schedule 2 to, Lloyd's Act 1982 and sections 7 and 9 of Lloyd's Act 1911").

⁴⁴⁶ See for example CP 04/7, §2.79 ("Members pay contributions to the Society which form the Society's own assets (central assets)"). The FSA's failure to distinguish between the Corporation's personal assets and the Central Fund is remarkable.

⁴⁴⁷ See recently for example CP 04/7, §2.79 ("The Society uses central assets at its discretion to meet the obligations of any member that the member itself cannot meet and this use is reflected in our solvency test for Lloyd's"); note the absence of any differentiation between the Central Fund and the Corporation's (other) personal assets.

⁴⁴⁸ See for example *SOD*, Ch. 12 and *ibid.*, July 30, 1996 cover letter from the Corporation's then CEO, p.ii:-

To date, the Society has been able to deal with the non-payment of members' obligations through the application of the Central Fund. As at 30 June 1996, the Central Fund's net assets (excluding amounts owed by members) stood at approximately £505 million. In the absence of the successful implementation of the reconstruction plan, the Central Fund might not be able to meet the anticipated cash requirements arising out of members' shortfalls and the Society would be unlikely to meet the DTI's members' level solvency test. If the reconstruction plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off with consequent damage to members.

sufficient Central Fund are regulatorily unclear. There appears to be no statute or case on the point; while at LLD, §3.2.1G the FSA merely expresses a wish.

FSA regulation

LLD, §3.2.1G

- 4.64 LLD, §3.2.1G expresses the following wish: 'The "Society" should seek to ensure that the "Central Fund" provides protection for policyholders so as to minimise the need for Lloyd's policyholders to have recourse to the [FSA] "compensation scheme".⁴⁴⁹ Absent a rule or true direction⁴⁵⁰ elsewhere in LLD, *ibid.*, §3.2.1G appears to be⁴⁵¹ the substantive requirement. This key provision — appearing to recognise⁴⁵² the importance of a sufficient Central Fund in protecting assureds-at-Lloyd's and intended to 'promote confidence in the market at Lloyd's, and to protect certain consumers of services provided by the Society in carrying on, or in

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And see LLD, §3.2.3D:-

The Society must, in the exercise of its powers to make payments from the Central Fund or to provide other forms of financial assistance from the Central Fund, ensure that in calculating and determining the amount of any such payment or the amount of any other financial assistance, it takes no account of the amounts of compensation which policyholders may receive under the provisions of the compensation scheme in respect of protected claims against members.

'Financial assistance' is not defined. And see *ibid.*, §3.1.5D:-

The directions given in this chapter are given in relation to the exercise of the powers by the Society in respect of the Central Fund and are given with a view to achieving the objective of ensuring that the Society in making payments or in providing any other financial assistance from the Central Fund does so on a basis which takes no account of amounts of compensation which policyholders may receive under the provisions of the compensation scheme in respect of protected claims against members.

And see historically (in addition to the more recent CP 177 and PS 177, etc.), CP 48, §1.6:-

Members of Lloyd's will not have access to the Financial Ombudsman Service, and neither they nor Lloyd's policyholders will have access to the new compensation scheme. The draft LLD contains provisions designed to ensure that ... the FSA can properly monitor whether the Society's Central Fund offers Lloyd's policyholders equivalent protection to that available to policyholders of insurance companies under the new compensation scheme.

"[N]ew compensation scheme" is materially misleading: the FSA Compensation Scheme is in all relevant respects identical to the Policyholders Protection Act 1977 scheme. Under that regime there was no suggestion that the Central Fund was required to provide only 90% compensation.

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See LLD, §3.1.4: 'The directions in this chapter are given under section 318 of the Act (Exercise of powers through Council) for the purpose of achieving the objective specified, as required by section 318(2) of the Act.' On directions properly so called, see for example Reader's Guide, §21: 'The letter D is used to indicate directions and requirements given under various powers conferred by the Act – for example, directions under section 51(3) of the Act about the form and content of applications for Part IV permission. Directions and requirements are binding upon the persons or categories of person to whom they are addressed.' LLD, §3.2.1G is self-evidently not a direction in that sense.

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See for example LLD, §3.1.3G:-

The rules and guidance in this chapter are intended to promote confidence in the market at Lloyd's, and to protect certain consumers of services provided by the Society in carrying on, or in connection with or for the purposes of, its regulated activities. They do this by: (1) giving guidance to the Society about the protection that the Central Fund should provide for policyholders

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See for example LLD, §3.3.3G ('the significance of the Central Fund in the protection of policyholders'); CP 48, §7.12:-

The Society has confirmed that the information required [by the FSA under the then proposed LLD] on the Central Fund can be provided to the FSA at minimal additional cost because it is already collated for internal reporting purposes. Some additional costs will be incurred by both the Society and the FSA in resolving any enquiries arising from these reports and discussing any proposed changes in the Central Fund arrangements. This will be important, however, for the protection of policyholders who depend on Lloyd's common security.

And see for example CP 16, §94:-

The Lloyd's crisis of the late 1980s and early 1990s showed how adverse developments combined with poor underwriting practices in some syndicates could erode the resources of many individual members and thus impose a burden on the Central Fund sufficient to threaten its existence, and thereby the whole market.

connection with or for the purposes of, its regulated activities⁴⁵³ — is multiply infelicitous. For example:-

(1) its distinction between "policyholders"⁴⁵⁴ and "Lloyd's policyholders"⁴⁵⁵ appears to be mere defective drafting;

(2) it is self-evidently⁴⁵⁶ not a rule (and as a mere aspiration it conflicts with the course of insurance business at Lloyd's). Guidance 'need not be followed in order to achieve compliance with the relevant rule or other requirement.' It is not clear why the FSA does not promulgate a rule on the point, or why it erroneously states that it has already done so. The mere guidance apparently 'enabl[es] the FSA to keep under review the protection the Central Fund provides for policyholders.'⁴⁵⁷

(3) it confuses the Corporation with the Council;⁴⁵⁸

(4) while the Lloyd's enterprise purports to be solvent and trades as a going concern, any figure less than 100% is legally baseless, logically untenable, and indicates a misunderstanding of the Central Fund's habitual role as the Lloyd's enterprise is purportedly solvent and trading as a going concern, *viz.*, 100% personal-use-fund float. Surreptitious proportionate payment by the Council of liabilities falling on the Central Fund would presumably be taken by external insurance regulators as proof that the Lloyd's enterprise was insolvent and or acting in bad faith towards assureds-at-Lloyd's. The FSA appears in any event to have no power unilaterally, without notice to relevant assureds-at-Lloyd's, and without requiring self-regulators-at-Lloyd's to tone down or clarify "chain of security" blandishments, to dispossess any assured-at-Lloyd's of, or to exonerate the Council from having to provide, 100% indemnity;

⁴⁵³ LLD, §3.1.3G.

⁴⁵⁴ *Per* FSA Glossary, "policyholder":-

(as defined in article 3 of the Financial Services and Markets Act 2000 (Meaning of "Policy and "Policyholder") Order 2001 (SI 2001/2361)) the "person" who for the time being is the legal holder of the policy, including any "person" to whom, under the policy, a sum is due, a periodic payment is payable or any other benefit is to be provided or to whom such a sum, payment or benefit is contingently due, payable or to be provided.

Cf. IPRU(INS), §11.1's definition of "policy holder" (*sic*):-

the person who for the time being is the legal holder of the "policy" for securing the contract with the "insurer", and - (a) in relation to such "long-term insurance business" or "industrial assurance business" as consists in the granting of "annuities upon human life", includes an annuitant; and (b) in relation to "insurance business" of any other kind, includes a person to whom, under a "policy", a sum is due or a periodic payment is payable[.]

⁴⁵⁵ FSA Glossary does not define "Lloyd's policyholder". *Per ibid.*, "Lloyd's policy": "a contract of insurance written at Lloyd's". The definition is defective: not every insurance contract made at Lloyd's is evidenced by a Lloyd's policy.

⁴⁵⁶ See *Reader's Guide*:-

28. The letter G is normally used to indicate guidance given under [FSMA 2000] section 157. ... 29. ... Whatever guidance is used for, it is not binding on those to whom the Act and rules apply, nor does it have 'evidential' effect. It need not be followed in order to achieve compliance with the relevant rule or other requirement. So a firm cannot incur disciplinary liability merely because it has not followed guidance. Nor is there any presumption that departing from guidance is indicative of a breach of the relevant rule. 30. ... 31. Rights conferred on third parties (such as a firm's clients) cannot be affected by guidance given by the FSA. Guidance on rules, the Act or other legislation represents the FSA's view, and does not bind the courts, for example in relation to an action for damages brought by a private person for breach of a rule (see section 150 of the Act (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of the general prohibition on carrying on a regulated activity in the United Kingdom without authorisation (see sections 26 and 27 of the Act (Enforceability of agreements)).

⁴⁵⁷ LLD, §3.1.3G(2).

⁴⁵⁸ The Corporation has no primary self-regulatory powers or functions whatever in relation to the Central Fund or anything else: see Lloyd's Act 1982. s.6(1) *et seq.*

(5) when the Lloyd's enterprise is insolvent, 90% is not necessarily the correct figure. The Central Fund depends almost entirely on Members for contributions, a funding process entirely different to FSA Compensation Fund contributions. In NCFB, the Council has purported to restrict its power to raise Central Fund contributions, and has purported to prohibit the Central Fund from ordinarily paying any percentage of an EquitasRe-reinsured liability;

(6) there is no legal basis for applying the current FSA Compensation Scheme (and the previous, now obsolete Policyholders Protection Act 1975 scheme) to the Lloyd's enterprise, which seeks to distinguish itself from conventional insurance companies by the superiority of its security;

(7) it is inconsistent with self-regulators'-at-Lloyd's "superior securitisation" representations. No figure less than 100% appears to have been publicly ventured by self-regulators-at-Lloyd's nor disclosed — in parallel with representations of superior securitisation — to actual or prospective assureds-at-Lloyd's.

other provisions

4.65 Though proclaiming "the significance of the Central Fund in the protection of policyholders"⁴⁵⁹ and its intention to "promote confidence in the market at Lloyd's, and to protect certain consumers of services"⁴⁶⁰ — consistently with general observations made elsewhere by the FSA⁴⁶¹ — LLD, Chapter 3 ("The Central Fund"⁴⁶²) is vague and equivocal concerning the Central Fund. In what appears to

⁴⁵⁹ LLD, §3.3.3G.

⁴⁶⁰ LLD, §3.1.3G.

⁴⁶¹ See for example CP 16, §94:-

Prudential regulation of Lloyd's is complicated by the fact that Lloyd's consists of many individual insurers whose assets are not pooled and most of whom would not have the financial resources to be acceptable to supervisors as stand-alone insurers transacting similar levels of business. It is the existence of centrally-held resources, in particular the Central Fund, that underpins a high level of security for Lloyd's policies.

⁴⁶² LLD, Chapter 3:-

3.1.1 This chapter applies to the Society.

3.1.2 A contravention of the rules in this chapter does not give rise to a right of action by a private person under section 150 of the Act (Actions for damages) and each of those rules is specified under section 150(2) of the Act as a provision giving rise to no such right of action.

3.1.3 The rules and guidance in this chapter are intended to promote confidence in the market at Lloyd's, and to protect certain consumers of services provided by the Society in carrying on, or in connection with or for the purposes of, its regulated activities. They do this by: (1) giving guidance to the Society about the protection that the Central Fund should provide for policyholders; and (2) enabling the FSA to keep under review the protection the Central Fund provides for policyholders.

3.2 The Central Fund

3.2.1 The Society should seek to ensure that the Central Fund provides protection for policyholders at least equivalent to that available to other policyholders under the compensation scheme.

3.2.2 The Society should seek, and take appropriate account of, the FSA's views on all proposed changes in its arrangements relating to the Central Fund.

3.3 Information about the Central Fund

3.3.1 The Society must give the FSA a report on the Central Fund as at the end of each calendar quarter.

3.3.2 The report referred to in LLD 3.3.1R must reach the FSA within two weeks of the end of each calendar quarter and must include information on: (1) the net market value of the Central Fund; (2) payments made from the Central Fund in that quarter; (3) the types of investment in which the Central Fund is held; (4) the commencement or cessation of, or any changes in the terms of, any insurance policy taken out to protect the Central Fund; and (5) any claim made, or circumstances notified that are likely to lead to a claim, under any insurance policy taken out to protect the Central Fund.

3.3.3 Because of the significance of the Central Fund in the protection of policyholders, the Society should notify the FSA under LLD 3.3.2R(5) of all matters relevant to any actual or potential claim. These include

be classic 'light touch' regulation, the FSA stipulates that the Corporation: (1) 'should'⁴⁶³ give the FSA 'adequate notice' of all changes that 'it'⁴⁶⁴ proposes to make to 'its' byelaws; (2) 'should'⁴⁶⁵ seek, and 'take appropriate account' of, the FSA's views on all 'proposed changes in its arrangements relating to the Central Fund'; (3) 'must'⁴⁶⁶ give the FSA a written⁴⁶⁷ 'report'⁴⁶⁸ on the Central Fund as at the end of each calendar quarter.

seizure and disbursement

- 4.66** The FSA, which appears to have no express power to seize any part of the Central Fund, will presumably be concerned in not-BBSN circumstances to ensure proper marshalling of Central Fund assets and proper disbursement, and to eradicate any discretion which the Council may seek to assert. even, impartial distribution consistent with blandishments.

APPLICATION

orientation

Old Central Fund

- 4.67** The Old Central Fund is expressly capable of being applied to: (1) any purpose;⁴⁶⁹ (2) making good any default by any Member under any insurance contract underwritten at Lloyd's;⁴⁷⁰ (3) preventing the occurrence or reducing the extent of such default by any Member;⁴⁷¹ (4) compensating in whole or in part any person (including the Corporation) for making for or on behalf of any Member any payment which has the effect of preventing or reducing such default by any such Member;⁴⁷² (5) extinguishing or reducing any Member's liability to any person, whether or not under an insurance contract;⁴⁷³ (6) repaying money previously borrowed for OCFB purposes and paying interest, premium or other charges on

but are not limited to the facts on which that claim is based, the circumstances under which those facts arose and any relevant response to the claim from any insurer or reinsurer concerned.

⁴⁶³ LLD, §2.6.2G.

⁴⁶⁴ The FSA appears to confuse the Corporation (see Lloyd's Act 1871, s.3), which has no byelaw-making power (including, to stretch 'Corporation' unduly, through Members in Corporation general meeting: Lloyd's Act 1871, s.24 was repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch. 3), with the Council (see Lloyd's Act 1982, s.3), which does (see Lloyd's Act 1982, s.6(2)).

⁴⁶⁵ LLD, §3.2.2G.

⁴⁶⁶ LLD, §3.3.1R.

⁴⁶⁷ LLD §3.3.4G; *q.v.* for detailed provisions.

⁴⁶⁸ *Per* LLD, §3.3.2R, the report must reach the FSA within two weeks of the end of each calendar quarter and must include information on: (1) the Central Fund's net market value; (2) payments made from the Central Fund in that quarter; (3) the types of investment in which the Central Fund is held; (4) the commencement or cessation of, or any changes in the terms of, any 'insurance policy' taken out to protect the Central Fund; and (5) any claim made, or circumstances notified that are likely to lead to a claim, under any such 'policy'. As to this latter matter, see *ibid.*, §3.3.3G:-

Because of the significance of the Central Fund in the protection of policyholders, the Society should notify the FSA under LLD 3.3.2R(5) of all matters relevant to any actual or potential claim. These include but are not limited to the facts on which that claim is based, the circumstances under which those facts arose and any relevant response to the claim from any insurer or reinsurer concerned.

⁴⁶⁹ OCFB, §7(f).

⁴⁷⁰ OCFB, §7(a).

⁴⁷¹ OCFB, §7(b).

⁴⁷² OCFB, §7(c).

⁴⁷³ OCFB, §7(d).

such monies.⁴⁷⁴— in each case, "where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as [Members]".⁴⁷⁵ The Council's decision on the Old Central Fund's disposition is final.⁴⁷⁶ No-one, including an assured-at-Lloyd's, is entitled under the OCFB to any payment or account of the fund's assets.⁴⁷⁷

New Central Fund

- 4.68** The New Central Fund is expressly capable of being applied to: (1) directly or indirectly extinguish or reduce any Member's (or former⁴⁷⁸ Member's) liability to any person arising out of or in connection with insurance business carried on by him at Lloyd's;⁴⁷⁹ (2) repaying money previously borrowed for the purposes of the NCFB and paying interest, premium or other charges on that money;⁴⁸⁰ (3) repaying contributions made to the Central Fund under OCFB, §4(5) in accordance with NCFB, §10;⁴⁸¹ (4) any other purpose (whether or not similar to any purpose mentioned in (a) to (c) above) which may appear to the Council to further any of the objects of the Corporation;⁴⁸² (5) to discharge any obligation legally binding on the Corporation arising out of a relevant instrument executed at or before the NCFB's effective date⁴⁸³ — which would include payment under indemnities given by the Corporation to Equitas Re.⁴⁸⁴

not a relief fund for SYA participants

- 4.69** The Central Fund is not principally a compensation or relief fund for any Member or SYA participant. Neither he nor his creditors has any right to claim any part of it in BBSN circumstances. Presumably disbursing the Central Fund outside the Corporation's Lloyd's Act 1911, s.4 objects merely to relieve a Member or SYA participant would be an abuse of the Council's discretion. Indeed, the matter is entirely the other way for SYA participants (as with Members). The SYA participant will wish to know the extent to which the Council will not disburse the Central Fund, occasioning surreptitious breach of Lloyd's Act 1982, s.8(1) by re-reserving from the assets of the remaining stamp or conventional inward-RTCing SYA participants.

⁴⁷⁴ OCFB, §7(e).

⁴⁷⁵ OCFB, §7. On "advancement and protection", see Lloyd's Act 1982, s.6(1); Lloyd's Act 1911, s.4, second object.

⁴⁷⁶ OCFB, §9(2).

⁴⁷⁷ OCFB, §9(1).

⁴⁷⁸ NCFB, §8(5).

⁴⁷⁹ NCFB, §8(2)(a). Where Central Fund assets have been applied for that purpose, the beneficiary Member must refund it to the Corporation within 28 days of the latter's demand: *ibid.*, §11(1). The Council may at any time agree to reduce or waive the amount owed or demanded: *ibid.*, §11(2).

⁴⁸⁰ NCFB, §8(2)(b).

⁴⁸¹ NCFB, §8(2)(c) read with *ibid.*, Sch. 1, definition of "Central Fund".

⁴⁸² NCFB, §8(2)(d).

⁴⁸³ NCFB, §8(4)(a). Per *ibid.*, §17, the NCFB came into force immediately after the Council declared that all Equitas reinsurance contracts have become wholly unconditional in accordance with their terms (September 3, 1996?).

⁴⁸⁴ Presumably in relation to such liabilities, see for example *SOD*, p.123 ("[O]ngoing market" is colloquialism for "current SYA participants"): "Notwithstanding this 'firebreak' between 1992 and prior liabilities and the continuing market, it must be recognised that the ongoing market will indirectly remain exposed in a number of ways to 1992 and prior business reinsured by Equitas, including through the application of both overseas regulatory deposits and the New Central Fund."

*to pay claims***orientation; no express rights generally conferred**

- 4.70 There appears to be no statute or case law (the point appears to have ever arisen contentiously) on the assured's-at-Lloyd's legal right to any part of the money in the Central Fund. OCFB, which is a mere BO contract between the Corporation and the Member of no binding effect on any assured-at-Lloyd's, expressly⁴⁸⁵ provides that no assured-at-Lloyd's has any right to payment or an account⁴⁸⁶ of the Central Fund, and that the Council's decision is final.⁴⁸⁷ The Central Fund — not (*cf.* for example CFUS 2) a formal trust fund and having no express beneficiaries of right — has been described as "the ultimate safety net at Lloyd's",⁴⁸⁸ an 'integral part'⁴⁸⁹ of funding the payment of claims, a "key feature of Lloyd's",⁴⁹⁰ a "key element in the common security for Lloyd's policies",⁴⁹¹ whose principal purpose is to secure SYA participants' insurance contractual obligations. It is regarded as a claims *guarantee* fund by external insurance regulation (including EU,⁴⁹² UK,⁴⁹³ and New York). The FSA asserts its significance in the 'protection of policyholders'.⁴⁹⁴ The Court of Appeal's⁴⁹⁵ implication that there may be limits on the use of the Central Fund and the amount of Members' several Central Fund contributions appears to be based on a misunderstanding of the Central Fund's external insurance regulatory purpose and the potential and size of Members' relevant defaults.
- 4.71 It would be easy to argue (*a fortiori* in BBSN circumstances), absent any other relevant fund, that: (1) for as long as any valid claim remains unpaid, the Central Fund must be used to pay it (*cf.* the Council's notion, contradicted in any event by its automatic deployment of the Central Fund as personal-use-fund float, that its deployment of the Central Fund to pay claims is entirely discretionary), that the Central Fund is available to every assured-at-Lloyd's however old, dead, disappeared or impecunious any SYA participant may be, and that the Council has

485 OCFB, §9(1): 'No policyholder or any other person shall have any right to payment from the Central Fund or to any account of the management, investment or application of the assets comprised in the Central Fund.'

486 The Corporation provides general Central Fund accounts in its annual RA.

487 OCFB, §9(2): 'The decision of the Council on all matters as respects the Central Fund shall be final.'

488 *Lloyd's v Clementson* {2} [1997] LRLR 175, 213 (Cresswell J).

489 *Lloyd's v Clementson* {1} [1995] LRLR 307, 309 (Saville J).

490 CP 16, §13:-

A key feature of Lloyd's is the Central Fund, to which all members contribute and which is used to pay policyholder claims if a member is unable to meet his obligations under a contract of insurance. (Although the use of the Central Fund is in principle at the discretion of the Council, failure to use it in this way would have severe consequences for Lloyd's continuing ability to trade.) It is on the basis of this common security that Lloyd's is able to trade in other countries with a single licence in each (rather than its individual units having to be licensed separately). The Central Fund underpins the solvency of the market overall since ultimately it links the interests of all capital providers in the market and therefore those of all their policyholders. This linkage, which falls some way short of full mutualisation of risks, has important implications for the way insurance at Lloyd's is regulated.

491 CP 48, §3.6.

492 See for example Insurance Accounts Directive, Annex, §3(b). See incidentally *Lloyd's v Clementson* {1} [1995] LRLR 307, 326 (CA); *Lloyd's v Clementson* {2} [1997] LRLR 175, 221 (Cresswell J).

493 See Chapter 1. And see incidentally *Lloyd's v Clementson* {2} [1997] LRLR 175, 198, 205 (Cresswell J).

494 LLD, §3.3.3G.

495 See *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA). Per *ibid.*, one objection appears to be connected with whether a measure's "principal purpose" is to effect mutualisation. And see *R v Lloyd's ex parte Johnson* (unreported, August 16, 1996). The court may have meant that a Member cannot be made liable in excess of his proportionate participation on a particular SYA, but this is an entirely different point.

no power to deprive any assured-at-Lloyd's of recourse to the Central Fund; (2) the level of that payment must be 100%; (3) for as long as a valid claim remains outstanding, the Central Fund must be maintained by the Council at a magnitude sufficient to pay it 100% (*cf.* the Council's notion that it is appropriate to not collect, and to prevent itself from collecting, *any* Central Fund contributions to pay Equitas Re-insured liabilities), that the Council has no power to impoverish the Central Fund for political reasons, or otherwise to weaken it so that it is no longer able to fulfil (either generally or in relation to a particular class of insurance liability) its principal purpose — but no assured-at-Lloyd's has any express statutory, common-law or contractual right to any Central Fund⁴⁹⁶ money: no "policyholder or other person" has a right to payment from the Central Fund, or to any account of its management, investment or application.⁴⁹⁷

principal governing instruments

- 4.72** The principal instruments controlling the Central Fund are: (1) if the Central Fund is merely part of the Corporation's personal assets, Lloyd's Act 1911, s.7 (a private Act conferring no rights on those outside the Council's self-regulatory jurisdiction); (2) OCFB and NCFB (BO instruments to which no assured-at-Lloyd's is a party); (3) LLD, Ch. 3 ('The Central Fund'; the Council's contravention of the FSA's wish as expressed in *ibid.*, §3.2.1G is not⁴⁹⁸ actionable by any private person). In no such instrument is any right to any part of the Central Fund conferred on any assured-at-Lloyd's (*cf.* self-regulators'-at-Lloyd's relevant blandishments presumably intended to foster the impression among actual and prospective assureds-at-Lloyd's that the Central Fund will be used to pay claims regardless of BO reinsurance arrangements made by SYA participants such as RRC 4, §3). Indeed, the measure appears to deliberately avoid imposing any obligation on the Council to use the Central Fund to discharge an actual insurance liability incurred at Lloyd's.

claims by class

- 4.73** In blandishments concerning claims payment securitisation, self-regulators-at-Lloyd's generally make no distinction between particular syndicates, SYAs, SYA participants, UYs, or types of insurance product. Before R&R and NCFB, the Council appears to have not materially restricted, either by express⁴⁹⁹ self-regulatory measure or in practice, the Central Fund's availability — whether as PU float or CU disbursement — to any particular class of assured-at-Lloyd's. The notion, before the extremities of 1995-6, of the Council creating, as between itself and Members, an underclass of Central Fund beneficiary, would presumably have been unthinkable. *Per* the Council's OCFB and NCFB apparent discretions to determine both Central Fund payees and the amounts of their payments, all is supposedly at large (LLD, §3.2.1G is of no assistance on the point). Though no assured-at-Lloyd's appears to have any greater insurance-contract-based (*cf.* tortious) right than any other to a Central Fund payout of a particular size — the word 'guarantee' in 'Central Guarantee Fund' has long been dropped by self-regulators-at-Lloyd's, and there is presently no procedure for him to elect to be paid out from the Central Fund — the Council presumably should adopt an appropriate

⁴⁹⁶ Byelaw 4 of 1986, §9(1)

⁴⁹⁷ Byelaw 23 of 1996, §7(5). [Members' right to account; annual Corporation accounts]

⁴⁹⁸ See LLD, §3.1.2: 'A contravention of the rules in this chapter does not give rise to a right of action by a private person under section 150 of the Act (Actions for damages) and each of those rules is specified under section 150(2) of the Act as a provision giving rise to no such right of action.'

⁴⁹⁹ *Cf.* NCFB, §8(3) restrictions in relation to Equitas Re.

procedure, in relation to every relevant class of assured-at-Lloyd's, for determining that some assureds-at-Lloyd's will receive a lesser amount, or proportion, than others.

petitioning the Council; direct access

- 4.74** Conventionally at Lloyd's, no assured-at-Lloyd's claims, or ordinarily ever needs to claim, directly against the Central Fund. No express procedure or channel exists at Lloyd's for such a claim. To relieve, in BBSN circumstances, the relevant impecuniosity of a relevant SYA participant, at the instance of the latter's managing agency (for which special procedures exist), the Council will always deploy the Central Fund in favour of the trustees of the SYA participant's PTF-premium, initially as PU-fund float. In the case of an EquitasRe-assured-at-Lloyd's, however, there is no mechanism for Equitas Re to call on the Council to deploy it as a float for any RRC 4, §3 liability, or any *ibid.*, §9 expense. An unpaid EquitasRe-assured-at-Lloyd's, wishing to neither settle nor seek the final judgment on which access to some dedicated common-use funds depends, is free in principle to apply to the Council for Central Fund 100% indemnification, and there appears to be no legal basis — taking the entire Lloyd's enterprise into account — on which the Council is entitled to refuse the demand. In practice, the Council is presumably more likely to seek to influence, presumably through Equitas Holdings' "Lloyd's Director", a solvent Equitas Re to pay the claim in full rather than use the Central Fund.

use as PU-fund float

- 4.75** Self-regulators at Lloyd's represent that the Central Fund is the last of four "links" in a "chain of security", in recognition that a SYA participant's personal-use funds may well be insufficient to pay all his own personal insurance contractual liabilities. That is to some extent correct but does not clarify how the Central Fund is actually used. Ordinarily at Lloyd's, the Central Fund never pays claims. Rather, the Council habitually uses it — and it has long⁵⁰⁰ been used — at the instance of a managing agency as a non-discretionary, automatic personal-use float to remedy 100% a relevant deficiency in a particular SYA participant's personal-use funds (a practice which has founded (unsuccessful) arguments of reckless selling and or rating⁵⁰¹ and unfair competitive advantage⁵⁰²), which deficiency is usually precipitated by a managing agency's cash call on that SYA participant which need not (and usually does not) specify, and may not be attributable to, a particular claim.

fund of last resort; other uses

- 4.76** The Central Fund has been used initially (*cf.* eventually, after the SYA participant's failure to reimburse) as fund of last resort: For example: (1) in R&R; ⁵⁰³ (2) £70m syndicated loan.⁵⁰⁴

⁵⁰⁰ See for example See *Cromer WP*, §64 (p.17) on the possibility of a new scheme for using the Central Fund as a first, rather than last, resort: "At present the Central Fund ... can be called upon, after the member has exhausted his deposits, reserves and his private means. The new arrangement might be regarded as bringing forward the Central Fund to be used before, instead of after, the private means of the member." Out of this idea, rejected by *Cromer WP* (*ibid.*, §65, p.17) evolved Central Fund earmarkings after reserves and the Lloyd's deposit had been exhausted.

⁵⁰¹ Allegedly because the SYA participant's managing agency's active underwriter knew that the Council would always bail out the defaulting SYA participant however recklessly assumed the liabilities: see for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 222, 224 *et seq.*, 239 *et seq.* (Cresswell J).

⁵⁰² See for example *Lloyd's v Clementson* {2} [1997] LRLR 175, 225 *et seq.* (Cresswell J) and see *Lloyd's v Clementson* {1} [1995] 307 (Saville J and CA).

⁵⁰³ See for example *SOD*, the Corporation's then CEO's July 30, 1996 cover letter, p.ii:-

discretions**Lloyd's Act 1911, s.7 governs all?**

- 4.77 If the Central Fund is merely an undifferentiated part of the Corporation's personal assets (which it arguably is not; and it apparently is not so considered by the EU⁵⁰⁵), the various discretions at OCFB, §7 and NCFB, §8 appear to be overridden by Lloyd's Act 1911, s.7 (another reason why the NCFB, §8(4)(b) super-discretion is *ultra vires* the Council's Lloyd's Act 1982, s.6 powers).

discretion in the external insurance regulatory context

- 4.78 It is tempting to assert that sufficiency and deployment of the Central Fund to pay insurance liabilities is probably — as a FO legal matter, whatever the BO byelaws may say — not a matter of self-regulatory discretion or FSA-regulatory wishfulness but of BO self-regulatory, external insurance regulatory and or BO and or FO 'enterprise' obligation. But it is impossible to do so given LLD, §3.2.1G's mere wish (however much it may be a defective attempt to draft an obligation).

litigation in not-BBSN circumstances

- 4.79 Self-regulators-at-Lloyd's appear to wish it to be known by prospective and actual assureds-at-Lloyd's that the Central Fund vouchsafes full payment of every valid claim. The Central Fund is apparently no more or less than what the Lloyd's enterprise itself considers — subject to the difficulty of the Council's apparent discretion — that it needs to furnish to assureds-at-Lloyd's given the absurdity of piecemeal recourse against the traditional natural *solus*. The foregoing does not, however, impose on the Council any rational disbursement regimen. In not-BBSN circumstances, given the paucity of rules and procedures governing the Council's disbursement of the Central Fund, judicial guidance should be promptly sought to clarify the Council's alleged discretion and give predictability to the (contributions and) disbursement process, including as to proportions, raw amounts, and particular classes of payee.

extrication if obligation

- 4.80 If a positive obligation does exist, there appears to be no way out for the Lloyd's enterprise as presently structured and (imperfectly) understood by external insurance regulators, and given the 'full securitisation' blandishments that it persists in issuing to actual and potential assureds-at-Lloyd's, other than novation on the basis of full disclosure to the assured-at-Lloyds of the recourse rights that he is relinquishing, thorough external insurance regulatory reconfiguring of all

Alongside this return to profitability, the Society must face the magnitude of the losses which many Names have incurred on the 1992 and prior years of account. In comparison with the Equitas premium (calculated as at 31 December 1995) of £14.7 billion, syndicate assets (excluding Names' debt) available to meet these liabilities as at 31 December 1995 were £9.9 billion. A significant part of the balance is believed to be irrecoverable from the many Names who have incurred significant losses. To date, the Society has been able to deal with the non-payment of members' obligations through the application of the Central Fund. As at 30 June 1996, the Central Fund's net assets (excluding amounts owed by members) stood at approximately £505 million. In the absence of the successful implementation of the reconstruction plan, the Central Fund might not be able to meet the anticipated cash requirements arising out of members' shortfalls and the Society would be unlikely to meet the DTI's members' level solvency test. If the reconstruction plan were to fail, the Council would be required to reconsider whether the Society were still a going concern. If the going concern assumption were no longer valid, the Council would be obliged to put the Society into run-off with consequent damage to members.

504 RA 1996, p.35 (Notes to the financial statements, note 17).

505 See for example the distinction at Insurance Accounts Directive, Annex, §3(a) ('The net assets of the Central Fund') and *ibid.*, §3(b) ('The net assets of the Corporation of Lloyd's'). The draftsman could have inserted 'other' in *ibid.*, §3(b), but did not.

securitisation at Lloyd's, and immediate cessation of the Lloyd's enterprise's 'full securitisation' blandishments. Extricating the Lloyd's enterprise from its own blandishments — emanating from the need to extricate new Members from having to make sufficient contributions to a sufficient Central Fund — may be part of what is presently referred to euphemistically as 'losing the legacy issues',⁵⁰⁶ 'as an incentive to new capital to enter the market'.⁵⁰⁷

the Council's discretion

- 4.81** The Council has conferred on itself various byelaw — and thus solely BO — discretions,⁵⁰⁸ apparently accepted⁵⁰⁹ by the FSA, in relation to the disbursement of the Old Central Fund and the New Central Fund. *Per* OCFB, §7, "Monies out of the Central Fund may be applied and the Central Fund may be charged for any of the following purposes". See similarly NCFB, §8: "(1) Subject to sub-paragraph (3), moneys or other assets forming part of the Fund may be applied out of the Fund (including application by way of loan or on any other terms as to repayment) for any of the purposes specified in sub-paragraph (2)."
- 4.82** "[M]ay be used" and "may be applied" are ambiguous and may be drafting errors: perhaps all that is meant is that the Council is under no obligation to use the Central Fund *only* to pay claims. Only the Old Central Fund Byelaw expressly⁵¹⁰ refers to the Council's discretion, and then only in a header. The New Central Fund Byelaw

⁵⁰⁶ See for example *The shape of things to come in Lloyd's — strategies for run-off* (pub. run off business, undated, apparently a supplement to the Spring 2003 issue). *Ibid.*, p.5-6: 'The issue in the short term is to lose the legacy issues. This means shunting them off the balance sheet to show there is a fresh start. ... Why keep the problem if the uncertainty is crippling the live business?' This approach raises various fraud issues.

⁵⁰⁷ See for example *Plan of action*, by the Corporation's then 'project director of open years and run-off management' in *Lloyd's — strategies for run-off* (pub. run off business, undated, apparently a supplement to the Spring 2003 issue) p.7-8:-

Lloyd's recognised the need for a review of the options for closure of these run-off years. In particular ..., their closure will ... [a]ct as an incentive to new capital to enter the market [and] ... enable the whole market to focus on the future.

Thus what appears to be a new practice at Lloyd's of repudiating extant insurance liabilities and or giving new Member the arguably false impression that sufficient contributions to a Central Fund sufficient to discharge all extant insurance liabilities incurred at Lloyd's are not an inalienable incident of Membership. Avoiding playing 'pass the parcel' at SYA level — as by participating on YAs of a new syndicate, or on YAs unencumbered by conventional inward-RTC — may well be a proper SYA-level outcome. Avoiding Central Fund contributions at Member level is arguably not.

⁵⁰⁸ As to the use in OCFB and NCFB of the word 'discretion', only OCFB expressly refers to the Council's discretion, and then only in a header: *ibid.*, §9:-

Council discretion in administration of Central Fund — (1) No policyholder or any other person shall have any right to payment from the Central Fund or to any account of the management, investment or application of the assets comprised in the Central Fund. (2) The decision of the Council on all matters as respects the Central Fund shall be final.

NCFB retains (at *ibid.*, §8(1)) the former's §7 "may be used" and "may be applied" ambiguity and does not expressly refer in any relevant place to discretion (*ibid.*, §10 use of "discretion" is not presently relevant).

⁵⁰⁹ See for example CP 04/7, §2.79 ("The Society uses central assets at its discretion to meet the obligations of any member that the member itself cannot meet and this use is reflected in our solvency test for Lloyd's"). Note: (1) apparent confusion of the Corporation with the Council; (2) absence of differentiation between the Central Fund and the Corporation's (other) personal assets.

⁵¹⁰ Old Central Fund Byelaw, §9:-

Council discretion in administration of Central Fund — (1) No policyholder or any other person shall have any right to payment from the Central Fund or to any account of the management, investment or application of the assets comprised in the Central Fund. (2) The decision of the Council on all matters as respects the Central Fund shall be final.

retains the ambiguity and does not expressly refer in any relevant place⁵¹¹ to discretion. A similar apology can perhaps be made in relation to the Council's Lloyd's Act 1911, s.7(c) discretion. PRIN, Principle 9 ('Customers: relationships of trust') requires the Corporation — defined as an "insurer" at FSA Glossary — to 'take reasonable care to ensure the suitability of its advice and discretionary decisions for any "customer" who is entitled to rely upon its judgment.' Arguably the 'principle' applies to the Council, the OCFB's and NCFB's discretions' express recipient, given the FSA's confusion⁵¹² between the Corporation and the Council.

discretion's relevance to assured-at-Lloyd's

- 4.83 Contained in a mere byelaw — of no binding effect directly on any assured-at-Lloyd's — the purported discretion does not in any event affect any assured's-at-Lloyd's direct rights against the Central Fund by some direct (*cf.* SYA-participant-as-conduit) availability theory.

EquitasRe-reinsured liabilities

orientation

- 4.84 Self-regulators-at-Lloyd's appear to recognise that EquitasRe-reinsured liabilities fall on various legal grounds to be discharged at Lloyd's (though Equitas Re has so managed EquitasRe-reinsured liabilities as to give the false impression that it, rather than the Lloyd's enterprise, is the only recourse available).

as a float for Equitas Re

- 4.85 Equitas Re does not presently enjoy the luxury of being itself able overtly to recourse the Central Fund. For example, there appears to be no overt mechanism at Equitas Re for that company (or Equitas Holdings' "Lloyd's Director") to call on the Council to deploy the Central Fund as a float to remedy Equitas Re's cash flow difficulties: an overt equivalent at Equitas Re of the Central Fund as PU-fund float device at Lloyd's is entirely absent. Since Equitas Re does not account for Equitas premium by EquitasRe-reinsured SYA participant in the first place, no such Equitas premium can ever be the subject of a shortfall and there is no procedure in place for Equitas Re to access any Central Fund bridging facility.

NCFB, §8(3)(b) arguably *ultra vires*

- 4.86 NCFB, §8(3)(b) — an apparently fundamental change' apparently gone 'unremarked' by the FSA, which has an express⁵¹³ statutory⁵¹⁴ duty to monitor byelaws and other manifestations of the Council's Lloyd's Act 1982, s.6(1)-(2) self-regulatory powers — purports to create as between Members and the Lloyd's enterprise — it has no direct effect on any assured-at-Lloyd's — an underclass confined to EquitasRe-assureds-at-Lloyd's. This is the so-called 'firebreak' or 'ringfence' described, contradictorily, in *SOD*. Absent any relevant express law, the extent to which *ibid.*, §8(3)(b) (whether or not as aggravated by *ibid.*, §8(4)(b)) is inconsistent with the Council's obligations to valid-claimant unpaid assureds-at-Lloyd's is presently merely arguable. The notion of segregating part of the Central Fund and expressly not using it to pay a category of assureds-at-Lloyd's, and leaving the latter without any meaningful Central Fund recourse — a *fortiori* dependent on the commercial

⁵¹¹ New Central Fund Byelaw, §10 use of "discretion" is not presently relevant.

⁵¹² At for example LLD, Chapter 1 ('Society's regulatory functions'), *passim*; see particularly (for example) *ibid.*, §§1.2.2G, 1.3.4G, 2.1 1.R, 2.6.2G, etc.

⁵¹³ See FSMA 2000, s.314 *et seq.*

⁵¹⁴ FSMA 2000, s.314(1)(a).

self-interest of Members in Corporation general meeting — would appear to be legally repugnant to the Lloyd's enterprise' trading responsibilities. Self-regulators-at-Lloyd's thus expressly acknowledge liability in *SOD* ("will be liable ...") but purport to repudiate it by express self-improvement in the New Central Fund Byelaw. To this extent RRC 4 has resulted in two unauthorised securitisation schemes, plus the FSA's unauthorised aspiration to 90% Central Fund securitisation, not two approved classes of assured-at-Lloyd's. Depending on the construction of "directly", the provision, if valid, may prohibit the Council deploying the Central Fund as a float to infuse into a relevant dedicated common-use fund such as Lloyd's US Surplus-Lines Common-Use Trust Fund or Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund.

4.87 NCFB, §8(3)(b), a very rare example of the Council committing itself to being bound by a Corporation EGM resolution, is arguably *ultra vires* the Council's Lloyd's Act 1982, s.6(1)-(2) powers. For example:-

(1) breach of external insurance regulation: the New Central Fund Byelaw prohibition contravenes LLD, §9.2.1: "The Society must manage its affairs, including the exercise of its byelaw-making powers, with due regard to the interests of policyholders and potential policyholders." That the FSA has erred in attributing byelaw-making powers to the Corporation (only the Council is empowered to make byelaws, and the Corporation and Council are not synonymous) presumably does not affect the rule's substance;

(2) constitutionally, there is nothing in Lloyd's Acts 1871-1982 suggestive of not paying claims, either at all or to a particular class of assured-at-Lloyd's; nothing empowering or inviting the Council to create an underclass of assured-at-Lloyd's (including by using a "new Central Fund" as a purported segregation device), and nothing in Lloyd's Act 1982, Sch. 2 permitting the Council to make any byelaw which has the effect of suppressing the use of the Central Fund to pay claims generally or specifically — all the foregoing are presumably *a fortiori* while the Lloyd's enterprise purports to be solvent and conducts itself as a going concern, and while Members (the sole contributors to the Central Fund) trade as SYA participants without relevant restriction or inhibition. Presumably the Council had such matters in mind when saying "One of our first priorities once reconstruction was achieved was to re-examine the way in which Lloyd's security should operate, against the background of the changing needs and perceptions of our clients world-wide. The result of this exercise was to reconfirm our commitment to the underpinning of Lloyd's policies through the Central Fund".⁵¹⁵ And similarly: "The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet *any* shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for these purposes".⁵¹⁶ The latter is particularly misleading. The New Central Fund Byelaw has always expressly *prohibited* and continues to prohibit the New Central Fund's use to pay Equitas Holdings or any of its subsidiaries other than by

⁵¹⁵ Corporation RA fye December 31, 1996, p.4 (Chairman's statement).

⁵¹⁶ *SOD*, p.123-124. Italics added. Cf. for example the contemporaneous Market Bulletin Y266, June 14, 1996 ("New Central Fund Byelaw"), p.1 (italics added): "On 5 June 1996, the Council of Lloyd's passed the New Central Fund Byelaw, which serves two main purposes: ... to provide policyholder protection for all liabilities *other than* those reinsured into Equitas ...".

way of arm's length payment for benefits received,⁵¹⁷ or "directly for the purpose of extinguishing or reducing any liability of a [M]ember in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member".⁵¹⁸ The New Central Fund Byelaw does empower the Council to apply the New Central Fund for the latter purpose, but only with the prior sanction of Members in Corporation general meeting.⁵¹⁹

(3) in relation to the Corporation, there is nothing in its objects suggestive of not paying claims. The NCFB's inhibitions may literally 'protect' their personal financial interests but they cannot 'advance' Members' relevant interests per the Corporation's second statutory object, or otherwise be consistent with its first statutory object. They are therefore automatically contrary to Lloyd's Act 1982, s.6(2). To the foregoing must be added (for example) the Central Fund's purpose as a guarantee fund; self-regulators'-at-Lloyd's inducing representations to actual and prospective assureds-at-Lloyd's of the superior security provided by the Central Fund, and the automatic use of the Central Fund as 100% personal-use-fund float which could be used to pay claims;

(4) in relation to the EquitasRe-assured-at-Lloyd's, the Council appears to have informed none that he is a member of the underclass;

(5) self-regulatorily and financially, if the Council apprehends difficulty in providing full common-use securitisation to any class of assured-at-Lloyds, the remedy is, arguably, not self-improvement but cessation of business.

NCFB, §8(4)(b) arguably *ultra vires*

- 4.88** NCFB, §8(4)(b) is the super-discretion purportedly conferred by the Council on Members in Corporation EGM whether or not to permit the Council to disburse the New Central Fund to make NCFB, §8(3) disbursements, *viz.*, by way of payment (other than a payment on arm's length terms in respect of property, assets, services or other benefits) to any member of the Equitas group,⁵²⁰ or directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member.⁵²¹ The EquitasRe-assured-at-Lloyd's,

⁵¹⁷ New Central Fund Byelaw, §8(3)(a) read with *ibid.*, Sch. 1, definition of "Equitas group".

⁵¹⁸ New Central Fund Byelaw, §8(3)(b) read with *ibid.*, Sch. 1, definition of "Equitas reinsurance contract".

⁵¹⁹ New Central Fund Byelaw, §8(4)(b) (a rare recent example of Members' conscious effort being required to maintain the entire Lloyd's enterprise in good financial standing). For apparently the only other instance in which Members' resolutions in Corporation EGM are binding on the Council, see Lloyd's Act 1982, s.6(4) (in practice, such self-regulatory measures as Members in Corporation EGM are statutorily empowered to overturn often appear too anodyne to attract or warrant the timeous concern of Members or their professional advisers). Corporation EGMs, of which there was a significant number between 1992 and 1996 on various self-regulatory actual and potential controversies, were not previously much used, apparently emboldening self-regulators-at-Lloyd's: see for example General Meeting of Members of Lloyd's, Wednesday 5th November 1986; Statement by Mr. Peter Miller, Chairman, p.1:-

A General Meeting of course gives the membership an opportunity to put questions to the Council. I hasten to say that this is not an invitation to the membership at large to change the present practice whereby such questions are a rarity.

Cf. Walker CR, §1.12(g) (p.8):-

A combination of better disclosure and more pro-active regulation can do a great deal to protect names' interests; but in common with private investors who enjoy protection under the Financial Services Act, names should not have unrealistic expectations as to what regulation can deliver, and should always be critically alert to their own interests, and not merely when things go wrong.

⁵²⁰ NCFB, §8(3)(a).

⁵²¹ NCFB, §8(2)(b).

surreptitiously made (by NCFB, §8(3)(b)) an underclass in relation to other assureds-at-Lloyd's, without his consent or knowledge, is additionally dependent on the possible munificence of underwriting Members in Corporation EGM. Relevant representations made by self-regulators-at-Lloyd's to Members in 1996 appear to have been misleading.⁵²² The purported provision — a rare recent example of Members' conscious effort being required to maintain the entire Lloyd's enterprise in good financial standing⁵²³ — appears to be offensive to LLD, §9.2.1 (so far as presently relevant, 'The Society must manage its affairs, including the exercise of its "byelaw"-making powers, with due regard to the interests of policyholders...'). It is also arguably *ultra vires* the Council's Lloyd's Act 1982, s.6(1)-(2) powers.⁵²⁴

⁵²² *SOD*, p.123-4 (italics added):-

The Society has a number of contingent liabilities in respect of risks under policies allocated to 1992 or prior years of account. If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet *any* shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for these purposes.

Note also the unclear, ambiguous and or inconsistent use of "Society" to mean Members and or the Corporation. And *cf.* for example the contemporaneous Market Bulletin Y266, June 14, 1996 ("New Central Fund Byelaw"), p.1 (italics added): "On 5 June 1996, the Council of Lloyd's passed the New Central Fund Byelaw, which serves two main purposes: ... to provide policyholder protection for all liabilities *other than* those reinsured into Equitas ...". In *SOD*, self-regulators-at-Lloyd's warned prospective RRC 1 Accepting Names — *cf.* prospective EquitasRe-assureds-at-Lloyd's, to whom as a class neither self-regulators-at-Lloyd's nor any other regulator appears to have addressed any relevant communication — that the Central Fund would be both⁵²² liable and available to pay any shortfall in EquitasRe-reinsured liabilities not paid by Equitas Re: see for example *SOD*, p.123 ("If Equitas is unable to pay the 1992 and prior liabilities in full, the Society will be liable to meet any shortfall arising in respect of these policies. The New Central Fund Byelaw permits the application of the New Central Fund for this purpose" — in reality, the New Central Fund Byelaw has always prohibited such application. Elsewhere in the same document, self-regulators-at-Lloyd's represented that the New Central Fund would not be available to pay such claims, and that continuing Members would not be liable to make Central Fund contributions enabling the Central Fund to actually do so: see for example *SOD*, p.151 ("The New Central Fund may not be applied directly to meet 1992 and prior liabilities reinsured to close into Equitas [text omitted of exceptions not relevant to the present point] ..., or to provide financial support to Equitas unless the prior sanction of members of the Society in general meeting has been obtained.")). See also *ibid.*, p.152.

⁵²³ See for example *SOD*, p.131-132 (italics added):-

Regulatory authorities in a number of jurisdictions require the maintenance of local deposits for policyholder protection as a condition of Lloyd's syndicates maintaining their regulatory approvals and accreditation. These deposits (or the costs incurred in procuring them from third parties) are generally funded, directly or indirectly, by members of syndicates underwriting in those jurisdictions. As at 30 June 1996, the total value of such deposits was approximately £832 million. The LATF, which underpins underwriters' trading rights in the US, is funded largely by policyholders' premiums.

Notwithstanding the separate nature of members' underwriting obligations, these local deposits are either expressed to be available to meet liabilities on any Lloyd's policies with insureds in the relevant jurisdiction or currency (including policies allocated to the 1992 or prior years of account) or can in the last resort be expected to be applied in this way. Lloyd's is in negotiations with some overseas regulators and with Equitas with a view to agreeing that some of these deposits should be split so that in so far as any part is provided by the Lloyd's market (rather than by Equitas) *that part should not be available* in respect of 1992 and prior business. However, these negotiations do not relate to all overseas deposits (in particular, they do not relate to the Joint Asset Trust Funds (JATFs) amounting to approximately US \$208 million which support Names' US surplus lines eligibility and reinsurance accreditation) and it is clear that, in some cases, it may not be possible to agree such a split.

Members should therefore assume that were Equitas to fail to meet the 1992 and prior business liabilities in full: [1] overseas deposits in place at that time would be vulnerable to seizure by regulators or policyholders and to application to meet any part of those liabilities which Equitas failed to meet; and [2] Lloyd's might consider it appropriate (with the consent of members in general meeting, as described in Chapter 14) to apply the New Central Fund to prevent drawdowns on such deposits or to make good any part of the deposit used to meet liabilities reinsured by Equitas.

⁵²⁴ The Council's *vires* are set out at Lloyd's Act 1982, s.6:-

(1) The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder. (2) The

(Self-regulators-at-Lloyd's, in their relevant blandishments, do not thoroughly and candidly disclose NCFB, §8(4)(b) or the underlying politics which led the Council to promulgate that sub-paragraph.) Indeed, the provision appears to have no genuine self-regulatory content at all. For example:-

(1) Members are not an appropriate repository of a discretion involving the Central Fund. Exercise of a meaningful self-regulatory function in Corporation EGM⁵²⁵ is the very matter that the May 18, 1927 Central Fund Agreement was promulgated to circumvent. The Old Committee imposed that agreement; it was not promulgated by consensual byelaw.⁵²⁶ *Fisher WP* recommended repeal of Lloyd's Act 1871, s.24 for similar reasons.⁵²⁷ Lloyd's Act 1982 deprived Members in Corporation EGM of

Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act[.]

The Corporation's Lloyd's Act 1911, s.4 four objects are ([] and numbers therein editorially added):-

The objects of the Society shall be:— [1] The carrying on by Members of the Society of the business of insurance of every description including guarantee business; [2] The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise; [3] The collection publication and diffusion of intelligence and information; [4] The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

⁵²⁵ NCFB, §8(4)(b). For apparently the only other instance in which Members' resolutions in Corporation EGM are binding on the Council, see Lloyd's Act 1982, s.6(4) (in practice, such self-regulatory measures as Members in Corporation EGM are statutorily empowered to overturn often appear too anodyne to attract or warrant the timeous concern of Members or their professional advisers). Corporation EGMs, of which there was a significant number between 1992 and 1996 on various self-regulatory actual and potential controversies, were not previously much used, apparently emboldening self-regulators-at-Lloyd's: see for example General Meeting of Members of Lloyd's, Wednesday 5th November 1986; Statement by Mr. Peter Miller, Chairman, p.1:-

A General Meeting of course gives the membership an opportunity to put questions to the Council. I hasten to say that this is not an invitation to the membership at large to change the present practice whereby such questions are a rarity.

Cf. Walker CR, §1.12(g) (p.8)

The Council appears to have moved from a position of choosing which Corporation EGM resolutions to implement (see its retorts to EGM Initiative activities in 1992-3) to impliedly committing itself to implement resolutions whatever they say (see Corporation EGMs requisitioned by the Council since 1993). Perhaps this is only in relation to EGMs requisitioned, and resolutions tabled, by the Council, not revolting Members.

⁵²⁶ See (now obsolete) Lloyd's Act 1871, s.24.

⁵²⁷ See historically (for example) *Fisher WP*, p.18:-

In our opinion the general Meeting of Members is no longer a suitable body to make Bye-laws for Lloyd's. ... In 1871 there were 675 Underwriting Members of Lloyd's, all resident in the United Kingdom and most of them carrying on business in the City of London. In 1980 there are 18,643 Underwriting Members, of whom 3,121 reside overseas. Only 3,200 are working Members. Only a small minority of Members attend General Meetings: the percentage has never exceeded 5.3% in recent years... With the great increase in the membership in the period 1977-79, the percentage has declined still further; at the meeting in June, 1979 it was 2.9%. Thus, though the procedure under s24 of Lloyd's Act 1872 may seem to place the rule-making power where it should belong, in the whole membership, this is a fiction. General Meetings are not truly representative of the whole body of Members.

And see *ibid.*:-

We do not believe that the whole body of Members could be said to be properly qualified to pass judgment on all the difficult questions which are likely to arise when proposed Bye-laws are under consideration.

And see General Meeting of Members, Wednesday 24 June 1987, Statement by Mr. Peter Miller, Chairman, p.5-6 (recalling *In re. London and Globe Finance Corporation, Limited* [1903] 1 Ch. 728, 731-2 (Buckley J): "[T]he apathy of the public in setting the law in motion has, I will not say encouraged, but has at least failed to repress, grievous frauds which have been committed and too often have gone unpunished");:-

Historically, voting on the Society's affairs has not been a major pastime for members of this Society. Ten years ago, less than ten per cent of members voted for Committee elections. While these numbers improved dramatically for the first election for the new Council, with two-thirds of the working constituency and half the external voting in 1983, these figures have now sunk to half and one third respectively. It is unfortunate if there is a silent majority - if only because that respected body is prayed in

almost⁵²⁸ all their Lloyd's Act 1871 self-regulatory functions and powers, since when there is no constitutional (and arguably no other proper) basis at Lloyd's empowering or entitling the Council to place a matter of such elementary importance in the hands of Members;

(2) the Council appears to have no statutory power to delegate⁵²⁹ its functions to Members;

(3) the Council has no power to permit Members to surreptitiously create an underclass of assured-at-Lloyd's;

(4) the delegation was made for political, not proper self-regulatory, reasons. The Corporation's first and second statutory objects presumably envisage advancing and protecting Members by upholding the integrity of their insurance business rather than merely shielding them from reasonable financial incidents of that business;

(5) the Council has prescribed no basis on which any Member will exercise his Corporation EGM vote self-regulatorily, or otherwise than self-interestedly. Thus use of the New Central Fund (if there is such a fund) to discharge EquitasRe-insured liabilities is substantially unregulated. Not-BBSN circumstances supervening, presumably NCFB, §8(4)(b) will be immediately replaced by a self-regulatory measure of self-regulatory character.

a ringfence considered in *Equitable Life v Hyman*

4.89 A purported ringfence of a conceptually and financially not wholly dissimilar kind — though there are material structural and transactional differences between Equitable Life and the Lloyd's enterprise — was considered in *Equitable Life v Hyman*.⁵³⁰ Held in relation to an allegedly discretionary bonus payable to an assured, that it was actually an integral part of what had been contracted for and the Society did not have the discretion to not pay it that its articles of association purported to confer.⁵³¹

CONTRIBUTIONS

generally

4.90 There appears to be no statutory requirement that a Member make joint, joint-and-several or several contributions to any Member-level CU fund. Singularly, general structural, articles-of-association-type obligations concerning Central Fund contributions are conspicuously absent in Lloyd's Acts 1871-1982. Central Fund contributions are principally at a lower contractual level, *viz.*, the General Undertaking (natural Member) or MA 1 (corporate Member). The Council — empowered to promulgate only byelaws consistent with the Corporation's statutory objects⁵³² and for the proper and better execution of (among others) Lloyd's Act

aid on every occasion when a member urges a course of action upon the Council for the wisdom of which there is little or no evidence. May I therefore urge you as members to take your voting seriously.

⁵²⁸ The principal exception is at Lloyd's Act 1982, s.6(4) (Members in Corporation general meeting empowered to resolve that a particular recent byelaw be revoked or annulled).

⁵²⁹ See generally Lloyd's Act 1982, s.6(5) *et seq.*

⁵³⁰ *Equitable Life Assurance Society, Re Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, [2000] 3 WLR 529 (HL); *aff'd* [2002] 1 A.C. 408, [2000] 2 WLR 798 (CA). And see *ibid.*, [2002] EWHC 140 (Ch), [2002] 2 BCLC 510.

⁵³¹ See for example at [2000] 3 WLR 529, 539-540 (Lord Steyn); *ibid.*, 541-542 (Lord Cooke).

⁵³² See Lloyd's Act 1982 s.6(2) read with *ibid.*, s.6(1).

1982, s.8(1)⁵³³ — has empowered itself, probably properly,⁵³⁴ to require,⁵³⁵ and does require,⁵³⁶ underwriting Members to make severalised⁵³⁷ annual contributions — viz., only his own particular due to that particular fund, not that of any other Member — to the New Central Fund (and in former times, to the Old Central Fund). However BO-mandated or -excused, they appear to be regarded by self-regulators-at-Lloyd's⁵³⁸ as an inalienable incident of Membership⁵³⁹ (it is not irrelevant that contributing to a compulsory Central Fund originated by imposed

⁵³³ Lloyd's Act 1982, s.6(2). The Council has no power to promulgate substance contravening *ibid.*, s.6(1)-(2) even if the substantive source be the FSA purporting to act under FSMA 2000, s.318 or otherwise.

⁵³⁴ Lloyd's Act 1982, Sch. 2 does not provide for a byelaw concerning mutualisation in general, or the Central Fund in particular. The nearest provision is Lloyd's Act 1982, Schedule 2(38) — although Old Central Fund Byelaw's and New Central Fund Byelaw's official Explanatory Notes invokes *op. cit.*, §(1) and (4) — which empowers the Council to make byelaws for "providing for the establishment and maintenance of a scheme for the protection of Lloyd's policyholders, underwriting members and others in the event of the default of a Lloyd's broker and for empowering the Council to require Lloyd's brokers and others to be parties to and to contribute to such scheme as a condition or requirement of the grant or renewal of permission to broke insurance business at Lloyd's as a Lloyd's broker or otherwise" (italics added). See generally *Lloyd's v Clementson* {1} [1995] LRLR 307, 309 (Saville J).

⁵³⁵ As it does at Old Central Fund Byelaw, §2(b), etc.

⁵³⁶ Lloyd's Act 1982, Schedule 2 does not provide for a byelaw concerning mutualisation in general, or the Central Fund in particular. There is no mention of the Central Fund in any Lloyd's Act. The nearest provision is Lloyd's Act 1982, Schedule 2(38), which empowers the Council to make byelaws for "providing for the establishment and maintenance of a scheme for the protection of Lloyd's policyholders, underwriting members and others in the event of the default of a Lloyd's broker and for empowering the Council to require Lloyd's brokers and others to be parties to and to contribute to such scheme as a condition or requirement of the grant or renewal of permission to broke insurance business at Lloyd's as a Lloyd's broker or otherwise" (italics added). This implements *Fisher WP*'s recommendation in this regard: *Fisher WP*, §24.15 (p.144) and clearly does not refer to the Central Fund's role in the context of default by a Member.

⁵³⁷ The requirement to contribute severally rather than jointly or jointly-and-severally appears to arise solely from custom, presumably originally by design. There appears to be no legal reason why it need be several, not joint or joint-and-several: Lloyd's Act 1982, s.8(1) concerns SYA-level insurance liabilities, not Member-level contractual liabilities. Several trading as part of a group is not unique to the Lloyd's enterprise: see for example *D.R. Insurance Co. v Central National Insurance Co.* [1996] 1 Lloyd's Rep. 74 (Moore-Bick QC); *D.R. Insurance Co. v Seguros America Banamex* [1993] 1 Lloyd's Rep. 120 (Hamilton QC). The Council may promulgate only such byelaws as are consistent with (among other provisions) Lloyd's Act 1982, s.8(1): *ibid.*, s.6(2). The severalised contributions are consistent with *ibid.*, s.8(1). For litigation apparently based on misconstruction of s.8(1), see for example *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398 (CA).

⁵³⁸ See for example Corporation RA fye December 31, 1996, p.4 (Chairman's statement):-

A commitment to single security carries with it the inescapable obligation to review the system that underpins it and ensure that it is both robust and fair to all members who, by continuing or joining, have agreed to the mutual support provided by the Central Fund mechanism.

⁵³⁹ Historically see latterly for example the then Deputy Chairman of Lloyd's April 8, 1981 market letter:-

As the Chairman indicated in his address to Members on the 4th November last, the security behind a Lloyd's Policy has to be beyond question. For this reason he emphasized that changes might need to be made in the financial requirements existing when Members were first elected, including those relating to the Central Fund. Lawyers advising upon the drafting of the Lloyd's Bill were concerned that the Bill should make it clear that Lloyd's had the power to pass Bye-laws despite the fact that such Bye-laws might well be inconsistent with those terms of membership which are contractual and agreed between the Society and the Member [etc.]

'[M]ight well be inconsistent with those terms of membership which are contractual' is curious: byelaws are (and always have been) merely contractual. For a(n apparently only prospective) of the 1986 General Undertaking (which so far as presently relevant follows the alleged 1811 trust deed), see *op. cit.*, p.2:-

[T]he Committee of Lloyd's has approved the addition of the following clause to the General Undertaking of Members: "I agree to be bound by any Bye-law of Lloyd's that may be made or become effective subsequent to the date of this Undertaking notwithstanding that there may be some inconsistency between the effect of such a Bye-law and any Agreement between Lloyd's and any other party and/or myself which may come into being in connection with my entry into Membership of the Society of Lloyd's."

agreement rather than, at then Members' option, Lloyd's Act 1871, s.24 byelaw⁵⁴⁰). Presumably contributions in the first place are Members' acknowledgment that Membership (*cf.* SYA participation) involves contributing to CU funds sufficiently to gratify the Corporation's relevant statutory objects⁵⁴¹ and thus preserve a commercially viable Lloyd's enterprise. The popular failure⁵⁴² to distinguish between Membership and SYA participation presumably does not reflect among Members any wish to join Lloyd's merely to mutualise SYA participants' insurance liabilities. Monies constituting the Central Fund used to be supplemented until the early 1980s⁵⁴³ by SYA-level PU guarantee policies⁵⁴⁴ (part of the 'chain of security'⁵⁴⁵) bought by SYA participants from other⁵⁴⁶ SYA participants, a direct reminder to Members and SYA participants of the importance of central CU-based securitisation.⁵⁴⁷ Central Fund contributions are now particularly provided for in (for example) OCFB, NCFB, and detailed subsidiary provisions.⁵⁴⁸

4.91 Members are said by self-regulators-at-Lloyd's to be "linked together"⁵⁴⁹ by a "single security",⁵⁵⁰ which, in the absence of any other⁵⁵¹ source, can be as good

⁵⁴⁰ One reason why NCFB, §8(4)(b) is so incongruous.

⁵⁴¹ At Lloyd's Act 1911, s.4.

⁵⁴² Two random (and curious) examples: *Investors Chronicle*, October 25, 1985, p.102: 'Now is the time for all good men and true who can pass the solvency tests (which are not as demanding as some might think) to become members of Lloyd's. ... New names can - we hope - assume that the risk of anything going wrong, over and above the purely insurance type risk which they are paid to run, is now virtually nil.'; *Financial Times*, June 7, 1986, p.VIII, col. 2: '[M]ost observers agree that 1986 is a good time to become a Lloyd's member because a three-year upturn apparently began in 1985.'

⁵⁴³ On mutual guarantee policies (abolished in 1982), see *Lloyd's v Clementson* {2} [1997] LRLR 175, 202 (Cresswell J). Historically see *Fisher WP*, §24.12 recommending their abolition, on which see the then Deputy Chairman of Lloyd's April 8, 1981 market letter (registered number 2168), p.1-2:-

The Committee supports the Fisher recommendation and has decided that the Guarantee Policies should cease to be provided after the end of this year: i.e. the last Policies (which are currently being prepared) will be in respect Account. However, as the Policies represent chain of security, the Committee has decided of the 1981 Underwriting one of the links in the that they should be replaced as soon as possible by other security and that this should be in the form of an increase in Members' contributions to the Central Fund. The increase would be for an amount which was not less than the premium which Members would otherwise be required to pay for their Guarantee Policies.

⁵⁴⁴ Guarantee policies, mentioned at *Astor's Law of Lloyd's*, 2nd Ed., are outside this work's scope. See generally the then Deputy Chairman of Lloyd's April 8, 1981 market letters (registered numbers 2168 and 2169); the then Deputy Chairman of Lloyd's August 29, 1979 market letter; the then Clerk to the Committee's May 16, 1958 market letter, etc.

⁵⁴⁵ See the then Deputy Chairman of Lloyd's April 8, 1981 market letter (registered number 2168), p.1 ('Underwriting Members are required each year to provide Guarantee Policies in respect of their underwriting in all Syndicates. These Policies are one of the links in the chain of security that lies behind a Lloyd's Policy.')

⁵⁴⁶ See the then Deputy Chairman of Lloyd's April 8, 1981 market letter (registered number 2168), p.1 ('The Guarantees must be subscribed by other Lloyd's Syndicates. Although the premium charged is negotiable, it is generally 10p per cent of the sum guaranteed.').

⁵⁴⁷ And see for example the then Chairman of Lloyd's November 4, 1980 address to Members (referred to at the then Deputy Chairman of Lloyd's April 8, 1981 market letter (registered number 2169), p.1: 'As the Chairman indicated in his address to Members on the 4th November last, the security behind a Lloyd's Policy has to be beyond question').

⁵⁴⁸ See recently (for example) Mkt. Bn. Y3134 (September 4, 2003; 'New Central Fund contributions, Members' Subscriptions, Premium Levy and other charges for 2004'); Mkt. Bn. Y3001 (February 26, 2003; 'Arrangements for the collection of New Central Fund contributions'). And see historically (for example) Reg. Bn. Y629 (July 7, 1997; 'Individual members and the position of the Central Fund in the chain of security'); Mkt. Bn. Y391 (September 30, 1996; 'Refund of Central Fund Special Contributions for deceased names').

⁵⁴⁹ See for example *Reg. Plan 1999*, p.8.

⁵⁵⁰ Corporation RA fye December 31, 1996, p.4 (Chairman's statement):-

only as current⁵⁵² underwriting Members' willingness and obligation to make orderly, predictable, compulsory contributions. The extent to which the Lloyd's enterprise is in a position to honour its blandishments depends principally on the sufficiency of those contributions. The FSA has power⁵⁵³ to require the Council to require Members to make contributions to the Central Fund (*cf.* the Corporation's personal debts). Recent changes to FSA Compensation Scheme Rules recognise that, in reality — especially given the absence of the Cromer-style 'steady flow of new [natural] members'⁵⁵⁴ and increasingly perfidious corporate Members — unlimited funds to replenish it may be difficult for the Council to procure.

directly enforceable by assured-at-Lloyd's?

- 4.92 Central Fund contributions as a FO matter — *viz.*, the extent to which such contributions can be compelled and paid over at an assured's-at-Lloyd's instance — appears to be an open question.

collection

- 4.93 The Council has cured the possibility that a Member may choose not to pay a Central Fund levy by providing for it to be raised automatically out of his PTF. Mechanisms already in place at Lloyd's generally prevent the underwriting Member from defaulting on his annual ordinary Central Fund contribution; and if he were to requisition a Corporation EGM to protest⁵⁵⁵ the issue, the Council will presumably ignore an adverse adopted resolution.

types

- 4.94 The Central Fund is largely constituted of annual compulsory contributions made to it over calendar years by Members. Though apparently not bound by any express overriding declaratory principle, the Council appears to follow the practice of levying Membership-level contributions severally. The amount of each of the annual and special contribution, and the due dates, are as prescribed by the Council.⁵⁵⁶ Concerning the New Central Fund,⁵⁵⁷ every underwriting Member is

A commitment to single security carries with it the inescapable obligation to review the system that underpins it and ensure that it is both robust and fair to all members who, by continuing or joining, have agreed to the mutual support provided by the Central Fund mechanism.

551 There appears to be no reason why Central Fund monies cannot come exclusively from a source other than Members.

552 The argument that former underwriting Members are also liable as contributories is discussed at *Astor's Law of Lloyd's*, 2nd Ed.

553 Via FSMA 2000, s.318.

554 See *Cromer WP*, second formal term of reference.

555 A resolution tabled at the Corporation's extraordinary general meeting on July 27, 1992 proposed:-

We request the Council immediately to rescind the Council resolution made on or about June 3, 1992 imposing a 1.66% levy on Names, to deliver to all Names within 4 weeks a full, frank written report particularising the capital base of the Lloyd's insurance market and its present and future capital requirements, and to investigate the fairest way of meeting those requirements from the Lloyd's community as it will be as at January 1, 1993.

The EGM postal ballot vote, announced August 28, 1992, was 8,160 Members in favour and 14,614 against.

556 NCFB, §4(3); see repetitiously re special contributions *ibid.*, 4(2).

557 On the financing of the New Central Fund, see generally *SOD*, p.152 ([] and numbers therein added):-

The resources of the New Central Fund will be of two kinds: paid-in funds which are immediately available and reserve funds which are available to be called from members of the Society as and when required. Paid-in funds The paid-in funds of the New Central Fund will consist initially of at least E 100 million which, on the settlement offer becoming unconditional, will be paid into the New Central Fund from the existing Central Fund. For each year of account thereafter, the paid-in funds will be increased by annual contributions payable by members at a level judged by the Council to be required by the

liable to make up to three types of contribution. Due payment of any of the three types of New Central Fund contribution is a condition of being permitted to sell insurance at Lloyd's.⁵⁵⁸ Types of contribution include (for example): (1) an annual contribution;⁵⁵⁹ (2) additionally,⁵⁶⁰ a "callable contribution", viz., one or more extraordinary contributions not exceeding, in total, a specified amount.⁵⁶¹ The callable contribution from all relevant underwriting Members is not to exceed £200m⁵⁶² in any calendar year or "such other sum as the Council may by special resolution determine";⁵⁶³ (3) additionally if it "appears requisite or expedient" to the Council, a "special contribution".⁵⁶⁴ NCFB provides for refunding special contributions.⁵⁶⁵ As part of R&R, the Council required Members to make an extraordinary refundable £384.242m Central Fund contribution⁵⁶⁶ which the Corporation contractually agreed to repay over time.

amount

Treasury and judiciary indications

4.95 The Treasury appears⁵⁶⁷ to take the view that there is a limit to a Member's obligation to contribute to the Central Fund. The Court of Appeal has indicated that

circumstances then prevailing, but subject to the following: [1] members who contributed to the members' special Central Fund contributions to the existing Central Fund in respect of the 1993, 1994 and 1995 years of account may have those contributions refunded as described in Chapter 4; and [2] the limitations imposed by the undertakings given by the Council in relation to the existing Central Fund are to continue to apply in relation to the New Central Fund. Broadly, in relation to 1997 and later years, the Council will be required to announce the proposed level of each year's paid-in contributions by 30 September of the previous year and will not be able subsequently to increase the level of contributions above those announced without the approval of a meeting of the members who are liable to pay.

Reserve funds The reserve funds of the New Central Fund will take the form of 'callable contributions' which members will be liable to pay only if called upon to do so. The aggregate amount of callable contributions in respect of any one calendar year will be fixed each year at a figure announced in advance by the Council. Until the Council decides otherwise, this figure will be 1200 million. The figure will be a fixed amount, which will be apportioned among the members underwriting for a particular year in proportion to their allocated premium limits for the corresponding year of account. The New Central Fund Byelaw provides that the undertakings given by the Council in relation to the existing Central Fund and referred to above will apply to the callable contributions so as to require that the aggregate amount of callable contributions is announced by 30 September of the previous year.

⁵⁵⁸ New Central Fund Byelaw, §4(9). The Council has empowered itself to require a Member to execute a written undertaking to the Corporation to duly pay a contribution: *ibid.*, §5(1). That undertaking may stipulate for such payment to be free of set-off, counterclaim or other deduction: *ibid.*, §5(2).

⁵⁵⁹ See generally New Central Fund Byelaw, §4(1)(a).

⁵⁶⁰ Query if there are inherent limitations on the Council's power to make extraordinary levies: see for example *Hole v Garnsey* [1930] AC 472, 501 (Lord Tomlin); the case was considered in *Napier & Ettrick v R.F.Kershaw Ltd., Lloyd's v Woodard and Wilson* [1997] LRLR 1 (a case on the scope of the PTD, §2(a)(i)).

⁵⁶¹ New Central Fund Byelaw, §4(1)(b).

⁵⁶² Discussed at *Kent RC*, §2. 29 (p.15).

⁵⁶³ New Central Fund Byelaw, §4(4).

⁵⁶⁴ New Central Fund Byelaw, §4(2).

⁵⁶⁵ See New Central Fund Byelaw, §10 and *ibid.*, Sch. 2.

⁵⁶⁶ See generally Corporation RA fye December 31, 1996, p.46; p.49 (Lloyd's Central Fund general fund account); p.56 (Lloyd's Central Fund notes to the financial statements, note 7).

⁵⁶⁷ See for example *Implementation of the insurers reorganisation and winding-up directive — Consultation Document* (Treasury, November 2002), §11-15:-

13. While we consider that some changes may need to be made to the way in which the statutory insolvency regime currently applies in relation to persons carrying on insurance business at Lloyd's to ensure the proper implementation of the directive, there are some fundamental aspects of the Lloyd's structure that we do not believe it is appropriate for us to interfere with. In particular, it is fundamental that members of Lloyd's underwrite for their own account and they do not therefore have responsibility for the liabilities of other members. The only way in which such liabilities are "mutualised" is in that members have an obligation to pay certain levies to the Central Fund. That obligation is not unlimited.

though a mere whiff of mutualisation in isolation is not necessarily objectionable,⁵⁶⁸ there may be limits to self-regulators'-at-Lloyd's power to require Members to fund the Central Fund and or mutualise SYA participants' liabilities,⁵⁶⁹ an indication which appears to be based on a misunderstanding of the Central Fund's purpose and the severalised nature of Central Fund contributions. Were not-BBSN circumstances to prevail, it will no doubt quickly become clear whether the supposed limit arises as a matter of law (and if so how) or practice; in relation to all outstanding liabilities incurred at Lloyd's or only certain classes, etc.

FSA indications

- 4.96** By contrast, the FSA appears⁵⁷⁰ to take the view that contributions must result in a sufficient Central Fund (see below).

must be sufficient?

- 4.97** The Central Fund's BO, 'enterprise-level (*cf.* external insurance regulatory) premise is presumably relative sufficiency rather than insufficiency, but LLD, §3.2.1G's sentiment is not that the Central Fund be sufficient to pay all assureds-at-Lloyd's in full. The external insurance regulatory sentiment is not dispositive. Presumably the Member must make whatever Central Fund contribution may be properly required of him by the Council acting solely under its Lloyd's Act 1982, s.6(1)-(2) express powers⁵⁷¹ (and by the FSA acting through the Council⁵⁷²). Central Fund contributions presumably must be quantified on sound regulatory (*cf.* political,⁵⁷³ emollient) criteria, though to say that contributions must on that ground be sufficient begs the question. Presumably the Council is not entitled to permit Members to make manifestly insufficient several contributions. The Central Fund's own proportionate cover plan lies in the willingness or otherwise of Members to pay contributions to it. Members will contribute willingly if they perceive that the Lloyd's enterprise is worth preserving. The extent is not presently clear to which the Council would be bound by a resolution of Members in Corporation EGM (including under Lloyd's Act 1982, s.6(4)) permitting the Council, contrary to its obvious self-regulatory obligations, not to quantify and levy sufficiently: there would be here an interesting overlap between self-regulation and external regulation SUP App. 2 scheme of operations.

if must be sufficient, potentially unlimited.

- 4.98** *Cromer WP* presciently remarked, "The more than the individual name is relieved of his unlimited liability, the more it must fall on his fellow names."⁵⁷⁴ The draft

'[N]ot unlimited appears to indicate that the Treasury to that extent does not consider the Lloyd's enterprise to be an 'unlimited[-liability]' enterprise of the kind discussed in *Unlimited-Liability Insurers CP*.

⁵⁶⁸ *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA).

⁵⁶⁹ See *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA). Per *ibid.*, one objection appears to be connected with whether a measure's "principal purpose" is to effect mutualisation. And see *R v Lloyd's ex parte Johnson* (unreported, August 16, 1996). The court may have meant that a Member cannot be made liable in excess of his proportionate participation on a particular SYA, but that is a different point.

⁵⁷⁰ See for example LLD, §3.2.1G.

⁵⁷¹ And if a byelaw so promulgated survives a Lloyd's Act 1982, s.6(4) challenge by Members in Corporation EGM.

⁵⁷² See FSMA 2000, s.318.

⁵⁷³ Arguably at the very time that SYA participants were receiving genuine or bogus 'profit', Central Fund contributions should have been materially increased.

⁵⁷⁴ See *Cromer WP*, §59 (p.16).

Bill clauses in *Unlimited-Liability Insurer CP*, limiting potentially unlimited contributions from members of an unlimited-liability insurer, are apparently not⁵⁷⁵ intended to apply to Members. BO Member-level contributions (which happen presently to be several) to a central fund have nothing⁵⁷⁶ to do with FO Lloyd's Act 1982, s.8(1) SYA-level several liability. Like SYA-level levies to expressly available PU and CU dedicated and not-dedicated claims payment securitisation trust funds, Central Fund contributions are not dispositive of enterprise liability, for which reason the Council expressly reserves the right to levy extraordinary contributions.

limiting contributions

BO provisions: orientation

- 4.99 Central Fund contributions are principally dealt with in OCFB, §4 and NCFB, §4 Byelaw 16 of 1993 (Membership, Central Fund and Subscriptions (Miscellaneous Provisions)) contains extraordinary provisions⁵⁷⁷ — apparently more of a political than a genuinely self-regulatory nature, and apparently inconsistently with the FSA's wish in LLD, §3.2.1G — purporting to fetter the Council's function of collecting sufficient contributions to a sufficient Central Fund. The byelaw is a mere BO contract between the Corporation and each Member and is not directly effective against an assured-at-Lloyd's. Presumably the byelaw, and undertakings given pursuant⁵⁷⁸ to it by the Council, can be countermanded by the FSA using its FSMA 2000, s.318 powers. The aggrieved Member's right to damages — if he can prove in the first place that he genuinely relied on a relevant undertaking, which would presumably be difficult given its extraordinary, non-regulatory character and the elementary need for Members to contribute sufficiently to a sufficient Central Fund — is limited by Lloyd's Act 1982, s.14. The proposition that a corporate Member can properly be excused by the Council from contributing to a Central Fund covering insurance obligations incurred before the Member's date of joining is questionable, the Lloyd's enterprise proceeding quintessentially on the basis that current Members guarantee current obligations, however ancient.

⁵⁷⁵ *Unlimited-Liability Insurers CP*, unnumbered thirteenth page:-

The draft clauses are not specific to [Equitable Life Assurance Company] — as noted above the Treasury understand that there is a small number of other unlimited liability insurers. It should be noted that the draft clauses apply only to insurers authorised under Part 4 of the Financial Services and Markets Act 2000 and, therefore, does not apply to participants in Lloyd's of London whose authorisation is achieved by different means.

It is not clear what authorisation has to do with contributions. Also, it appears that the Corporation is at least treated as if it were authorised under FSMA 20-00, Part IV to conduct Regulated Activities Order, §10 activities: FSA Glossary's definition of "insurer" includes the Corporation.

⁵⁷⁶ *Lloyd's v Leighs* {1b & 2b} [1997] CLC 1398, 1402 (CA; italics added):-

It is important to recognise the distinction between the underwriting transactions concluded with policy holders by Lloyd's names as insurers or reinsurers, and the contracts and other arrangements that they make which are ancillary to that business. It is the former to which s.8(1) of the 1982 Act applies. Section 8(1) is directed solely to the writing of insurance business at Lloyd's, not to contracts which the names may conclude thereafter which are ancillary to such business.

⁵⁷⁷ See for example the broad premise at *ibid.*, §2(1):-

Subject to sub-paragraphs (3) and (4), the Council may upon admitting a person to membership of the Society, or at any time while a person remains a member of the Society, enter into an agreement with, or give an undertaking in favour of, that person (in this paragraph called "the member") containing all or any of such provisions as are described in sub-paragraph (2) together with any such other provisions as the Council and the member may agree.

The byelaw contains provisions for Members gathering in Corporation EGM to vote on Central Fund contributions: see for example *ibid.*, §3.

⁵⁷⁸ See Byelaw 16 of 1993, §2(2)(a)-(e), especially *ibid.*, §(a) (grant of OCFB, §4 and NCFB, §4 exemption by the Council), *ibid.*, §(b) (levy only on satisfaction of conditions).

detailed provisions

- 4.100** The Council has by byelaw empowered itself to enter into agreements with, and give undertakings to, actual or prospective Members limiting⁵⁷⁹ their Central Fund and or New Central Fund contributions and Corporation entrance fees and annual subscriptions.⁵⁸⁰ The parties are free to agree any terms not expressly contemplated by the byelaw.⁵⁸¹ The byelaw expressly contemplates the Council (for example⁵⁸²):-
- (1) agreeing to exempt the Member from Central Fund, New Central Fund and Corporation entrance fees and annual subscriptions;⁵⁸³
 - (2) undertaking to a Member not to exercise relevant Central Fund and New Central Fund contribution-raising powers, and Corporation annual subscription-raising powers (either generally or as stipulated in the undertaking) unless some specified event has first happened or some specified condition has been satisfied;⁵⁸⁴
 - (3) undertaking to notify the Member of the proposed level of any Central Fund, New Central Fund or Corporation contribution or annual subscription for any year and that such contribution or annual subscription will not exceed the level referred to in the notice (except as may be specified);⁵⁸⁵
 - (4) undertaking to the Member that a Central Fund or New Central Fund contribution or Corporation subscription will be determined or calculated on a specified basis.⁵⁸⁶ The byelaw expressly contemplates the Member undertaking to pay his contributions or subscriptions in the specified manner and amount.⁵⁸⁷
- 4.101** The Council may not levy inconsistently with any current undertaking given under Byelaw 16 of 1993, regardless that the undertaking predates the New Central Fund byelaw.⁵⁸⁸ And generally, the Council may give undertakings to any person committing the Council to raise and or apply New Central Fund money, where it appears to the Council expedient to do so for the furtherance of the Corporation's objects.⁵⁸⁹

⁵⁷⁹ For eloquent expression of the illogicality of protecting the Member from a Central Fund extraordinary levy necessary to save the enterprise, see *Captives Guide*, p.1: "All members contribute to the [New Central Fund] but there are safeguards in place to protect members in the unlikely event that an exceptional loss requires Lloyd's to call for contributions beyond the specified levels."

⁵⁸⁰ See generally Byelaw 16 of 1993, especially *ibid.*, §2. It appears to have been promulgated in contemplation of corporate Members not being as amenable as natural Members to Central Fund levies especially to pay liabilities incurred before corporate Members first sold insurance at Lloyd's (the 1994 UY).

⁵⁸¹ Byelaw 16 of 1993, §2(1).

⁵⁸² For the full list, see Byelaw 16 of 1993, §2(2)(a)-(f).

⁵⁸³ Byelaw 16 of 1993, §2(2)(a). This sort of agreement requires the Council's special resolution: *ibid.*, §2(3). The special resolution may be general or particular: *ibid.*, §2(4).

⁵⁸⁴ Byelaw 16 of 1993, §2(2)(b). This sort of agreement requires the Council's special resolution: *ibid.*, §2(3). And see *ibid.*, §3 (meeting of the relevant class of Members may be held, and confined to Members standing to benefit from the undertaking).

⁵⁸⁵ Byelaw 16 of 1993, §2(2)(c).

⁵⁸⁶ Byelaw 16 of 1993, §2(2)(d).

⁵⁸⁷ Byelaw 16 of 1993, §2(2)(f).

⁵⁸⁸ Byelaw 23 of 1996, §4(7). In construing any such undertaking, any reference in it to the exercise of powers of the Council under the Central Fund Byelaw included a reference to the exercise of powers of the Council under the New Central Fund byelaw: *ibid.*, §4(7)(a), and see *ibid.*, (b)-(d).

⁵⁸⁹ Byelaw 23 of 1996, §15(2); and see Byelaw 22 of 1995, §13.

differential contributions

- 4.102** Query if the Council can properly require certain Members, and not others, to make particular Central Fund contributions based on the Council's proposed exercise of its discretion discriminatorily as between assureds-at-Lloyd's of particular properly constituted classes, and can create a Central Fund dedicated at either or both ends to any extent, *viz.*, segregating contributions of particular Members, and or discriminating between particular assureds-at-Lloyd's. The Council has no power to self-regulate in a Member's financial self-interest to the prejudice of an assured-at-Lloyd's (he funding obligations of Membership being inalienable and obvious, no properly advised corporate Member would rely on any such undertakings in the first place).

arguably not proper

- 4.103** However, it is arguable that the Council does not have the power, nor would it be a proper, satisfactory or good-faith discharge of its relevant responsibility, to protect the Member from a fundamental incident of Membership, *viz.*, enabling the Central Fund to provide 100% recourse to every assured-at-Lloyd's, but is obliged to raise whatever Central Fund levies may be from time to time required to enable the Central Fund to do so. That recourse to the Central Fund may be uncongenial to a Member appears to support the principle of providing such funds: the Lloyd's enterprise must offer what is congenial, and what has been promised, to the assured-at-Lloyd's. Having entered into the incidents of Membership, financial self-preservation is each Member's responsibility, not the Council's. Properly advised corporate Members — including so-called post-R&R 'smart money' — at whose disposal are the Lloyd's enterprise's multitudinous facilities for attracting premium income from induced buyers, would presumably not harbour a genuine belief that the post-R&R Lloyd's enterprise had extricated itself from EquitasRe-reinsured liabilities. Self-regulators-at-Lloyd's did not so represent;⁵⁹⁰ external insurance regulators did not so understand.

⁵⁹⁰

Se for example *SOD*, pp.7, 123-4.

APPENDICES

APPENDIX I

'Equitas Under English Law': An English Lawyer Replies

Richard J. Astor (August 2003; v.1.2)

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ABSTRACT

"Equitas Under English Law": An English Lawyer Replies is a summary, non-exhaustive reply to J. B. Haarlow and H. C. Griffin, *Equitas Under English Law*, 38 Tort & Ins. L.J. 1 (2003).

Haarlow and Griffin correctly distinguish between Equitas Re as RRC 4, §3 reinsurer and RRC 4, §9 run-off agent; correctly criticise the *non sequitur* that Equitas Re is a reinsurer because it is a run-off agent, and fairly question — and do so in the EquitasRe-assured's-at-Lloyd's financial and legal interests — the point, whatever may be the supposed ground, of seeking to make Equitas Re personally liable as a reinsurer in the first place.

Haarlow and Griffin misrepresent the extent to which English law has considered Equitas Re to be a reinsurer and conventional reinsurance-to-close ("conventional RTC") to be reinsurance; mischaracterise as provisions of law mere judicial précis of contractual provisions; fail to mention essential provisions dispositive of the nature and effect of conventional RTC; mis-state the nature and effect of conventional RTC, including in relation to its extrication and infiltration effects; mischaracterise the extent to which an assured-at-Lloyd's is required, constrained or able to collect directly from a relevant SYA participant personally; and mis-state the liability to the assured-at-Lloyd's of a conventionally outward-RTCD *originalis*, and omit to mention that the EquitasRe-reinsured SYA participant is the EquitasRe-assured's-at-Lloyd's conduit to a number of relevant expressly available and arguably available trust funds established precisely because of the infelicitousness of recourse to either Equitas Re or to any EquitasRe-reinsured SYA participant personally.

"Equitas Under English Law": An English Lawyer Replies discusses the rudiments of conventional reinsurance-to-close and its novatory and "conduit" effects; the relevance of Equitas Re as reinsurer and run-off agent; the logical absurdity of seeking to impose on Equitas Re liability as a reinsurer by arguing that it is a run-off agent; the recourse dangers of successfully transplanting reinsurance liability towards Equitas Re personally and away from EquitasRe-reinsured SYA participants as conduits to trust and other funds at the Lloyd's enterprise; and the significance and personal liability to an assured-at-Lloyd's of a SYA participant, including a conventionally outward-reinsured-to-close *originalis*.

Part I: Orientation

1. Preliminary

The present article is a summary, non-exhaustive reply to J. B. Haarlow and H. C. Griffin, *Equitas Under English Law*, 38 Tort & Ins. L.J. 1 (2003) ("the Article"). It does not purport to deal with every contentious point in the Article or be a complete account of every relevant feature or component of the Lloyd's or Equitas enterprise.

Herein, references to byelaws are to those promulgated by the Council of Lloyd's under Lloyd's Act 1982, s.6,¹ and "**Equitas Re**" means Equitas Reinsurance Ltd.² and or (if appropriate) Equitas Ltd.;³ "**FSA**" means the Financial Services Authority;⁴ "**Member**" means member of Lloyd's;⁵ "**originalis**" means a **SYA participant** who sold insurance to an **assured-at-Lloyd's**; "**RTC**" means reinsurance-to-close; "**SUA 1**"⁶ means the standard-form agency agreement between a natural (*cf.* a corporate) SYA participant and his managing agency (often called by "Lloyd's" "the managing agent's agreement (general)") at Byelaw 8 of 1988, Sch. 3, governing the relationship between the parties in respect of participation on SYAs budding in the 1990 underwriting year and subsequent underwriting years; "**SYA**" means "syndicate year of account",⁷ "**YA**" means year of account, and "**RRC 4**"⁸ means version FW962500.261/2+ (as amended and corrected by Reinsurance and Run-Off Contract Amendment Agreement, December 17, 1997) of the September 3, 1996 "Reinsurance and

¹ Lloyd's Act 1982, s.6 provides, so far as presently relevant:-

(1) The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder. (2) The Council may — (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and (b) amend or revoke any byelaw made or deemed to have been made hereunder.

On the FSA's supervision of the Council of Lloyd's, see for example Financial Services and Markets Act 2000, Part XIX, and FSA Lloyd's Sourcebook ("LLD").

² Incorporated in England and Wales, number 3136300. A private company the financial liability of each member of which is limited to the face value of his share(s). Its one £100 ordinary share is owned by Equitas Holdings Ltd.

³ Incorporated in England and Wales, number 3173352. All 780,000,001 £1 ordinary shares are owned by Equitas Re.

⁴ Incorporated in England and Wales, number 1920623 under the name Securities and Investments Board; changed its name to FSA October 28, 1997; a private company the liability of whose members is limited to the amount of the guarantees they give to the company. See www.fsa.gov.uk.

⁵ *Viz.*, the corporation, called "Lloyd's" *simpliciter*, created by Lloyd's Act 1871, s.3. The appellations "Society of Lloyd's" and "Corporation of Lloyd's" are bogus.

⁶ Astor Catalogue Number: see *Astor's Law of Lloyd's*, 2nd Ed.

⁷ Summarily described, a syndicate year of account is an accounting and collectivisation device enabling its individual participants (if more than one) to enter in a coordinated, collectivised fashion into their own individual separate contracts with each assured-at-Lloyd's through the mediation of their common, contractually enfunctioned managing agency. Participants on one particular YA of a particular syndicate are collectively referred to as the SYA "stamp". The word "syndicate" is often used, always erroneously, to designate SYA participants and SYA stamps, leading to immense confusion among those unfamiliar with the course of insurance business at Lloyd's, and to some misguided US federal jurisprudence concerning diversity jurisdiction over SYA participants.

⁸ *Astor's Equitas Re Handbook* catalogue number. *Op. cit.* catalogues more than twenty R&R instruments, of which the so-called Reinsurance and Run-Off Contract is only one. Curiously, relevant R&R instruments do not appear to have been catalogued by number elsewhere, and some, especially including RRC 4, appear to exist in more than one final version.

Run-Off Agreement" between: (1) Equitas Re; (2) Additional Underwriting Agencies (No. 9) Ltd.; (3) "Names" as defined; (4) "Closed Year Names" as defined; (5) the Corporation; (6) Equitas Ltd.; (7) Additional Underwriting Agencies (No. 10) Ltd.; (8) Equitas Policyholders Trustee.

2. Equitas Re's two capacities

The Article, p.5 rightly adverts to Equitas Re's two capacities. In relation to the same liabilities the company is RRC 4, §3 (FSA-authorised⁹) "reinsurer",¹⁰ and also *ibid.*, §9 run-off agent.¹¹ The Article correctly notes that some assured-side lawyers appear to have materially misunderstood¹² and confused Equitas Re's two capacities. There can indeed be no proper

⁹ Equitas Re and Equitas Ltd. are authorised and regulated by the FSA. US state regulation of Equitas Re and Equitas Ltd. is beyond the present article's scope, but see for example then New York State Insurance Commissioner Edward Muhl's address to New York Law School's Center for International Law, *Implications of the Reconstruction of Lloyd's of London* Symposium, November 6, 1996 (<http://www.nyls.edu/content.php?ID=713>):-

... I was handed a report and it was the [New York Insurance] department's review of the adequacy of the Lloyd's of London U.S. trust fund. Along with this report was an order that the insurance department counsel had put together. If I had signed that order, it would have de-accredited Lloyd's of London as an accredited reinsurer and an accredited excess and surplus lines rendered in New York, basically for their failure to maintain adequate monies in trust. ... New York is basically a port of entry of Lloyd's for the United States because we oversee all the U.S. trusts. We also control its status as an eligible writer in the United States market as well as in the excess and surplus lines. I asked my senior management if they realized what would happen if I signed the order. The general answer was very simply that Lloyd's would be de-accredited. I responded by saying, "If I sign this order, the insurance world as we know it would change."

I then asked my staff how many New York license companies had the bulk of their reinsurance recoverables through Lloyd's, and how many countrywide. The answer was that New York had fifty-one companies and countrywide we figured about 300 companies. So if I sign that order, Lloyd's and its reconstruction effort at the time would have failed and we would have fifty-one insolvent New York insurance companies and, at a minimum, 300 insolvencies countrywide. ... We set out to find a solution to this monumental problem because we did not like the alternatives....

¹⁰ RRC 4 provides (so far as presently relevant):-

3.1 [Equitas Re] shall ... reinsure and indemnify each and every Syndicate and each Closed Year Syndicate by payment in accordance with clause 3.4 and otherwise upon and subject to the terms and conditions of this Agreement. 3.2 The reinsurance and indemnity obligation of [Equitas Re] shall be to indemnify without limitation in time and amount, subject to and in accordance with the remainder of this clause 3, each Syndicate and each Closed Year Syndicate from and including the Effective Date, by way of reinsurance, in respect of all liabilities, losses, claims, returns, reinsurance premiums, costs and other liabilities including extra-contractual obligations or punitive or penal damages arising in relation to the Syndicate 1992 and Prior Business of that Syndicate or Closed Year Syndicate

And see the parallel provision at the so-called Retrocession Contract (Astor Catalogue Number RRC 5), §2. Per RRC 4, Sch. 2, §1, "1992 and Prior Business" means "all liabilities under contracts of insurance underwritten at Lloyd's (other than life business) and originally allocated to the 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or re-allocated pursuant to a premium transfer, into the 1993 or any later year[.]"

¹¹ RRC 4 provides (so far as presently relevant):-

9.1 In consideration of the Names and Closed Year Names, acting through the Substitute Agent, entering into the reinsurance agreement contained in Part I of this Agreement, ERL shall be entitled to assume, and undertakes and agrees to assume, responsibility for, and the Names and Closed Year Names irrevocably appoint ERL to perform, the Run-off in accordance with the provisions of this Part II of this Agreement and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds. 9.2 With effect from the time and date on which the last condition in clause 2.1 is satisfied, and subject to and in accordance with the provisions of the EATD, the ECTD and any Overseas Trust Deeds, ERL will assume exclusive and irrevocable responsibility for the Run-off of the Syndicate 1992 and Prior Business of each Syndicate and each Closed Year Syndicate.

And see parallel provision at the so-called Retrocession Contract (Astor Catalogue Number RRC 5), §8.

¹² Serious professional ethics issues arise, because some errors made in US federal and state litigation involving Equitas Re display an egregious lack of familiarity with elementary Lloyd's-Equitas law and practice.

factual, legal or logical basis for the *non sequitur* that Equitas Re is an assumption reinsurer because it is a run-off agent.

The Article, p.12 correctly indicates that Equitas Re's comprehensive RRC 4, §9 run-off functions mirror, and are derived directly from, those of every managing agency¹³ ordinarily at Lloyd's under relevant agency agreements¹⁴ promulgated by the Council of Lloyd's¹⁵ or its predecessor, the Committee of Lloyd's¹⁶ (and it is not irrelevant that some of the same US defense attorneys are now retained to advise Equitas Re as to advise managing agencies ordinarily at Lloyd's). Singularly, no rigorous comparison appears to have been ventured, by either side in any US federal or state litigation involving Equitas Re, between relevant parts of RRC 4, §9 and any relevant agency agreement. Such a comparison would have conclusively demonstrated the substantive and logical absurdity of invoking comprehensive, absolutist run-off agency functions to support an assumption reinsurance argument. The more extensively contractually empowered as a RRC 4, §9 run-off agent, the more similar Equitas Re becomes to a mere managing agency ordinarily at Lloyd's.

Part II: Equitas Re as insurer

3. Equitas Re as reinsurer in "English cases"

The Article discusses Equitas Re's role and function. *Ibid.*, p.6:-

The English cases that have examined R&R and the Reinsurance Contract have clearly recognized the same principles that the majority of American courts have considered in holding that none of the Equitas entities is a proper party to U.S. coverage litigation. These English cases firmly support the [conclusion] reached by those American courts that Equitas is a reinsurer

The representation is presently unsupportable. In none of the thirty-four¹⁷ reported and unreported English cases, or the two practice notes¹⁸ and one practice direction,¹⁹ disgorged by a

¹³ The managing agency is in contractual and other legal relations not principally with any assured-at-Lloyd's but principally with each of its principals, the individual participants on individual YAs of individual syndicates. On the nature of those relations, see for example *Henderson v Merrett Syndicates Ltd.* [1995] 2 AC 145 (HL; July 25, 1994) on appeal from *ibid.* [1994] 2 Lloyd's Rep 468 (CA; December 13, 1993) on appeal from *ibid.* [1994] 2 Lloyd's Rep 193 (Saville J; October 12, 1993); *Aiken v Stewart Wrightson Members Agency Ltd.* [1995] 2 Lloyd's Rep 618 (Potter J).

¹⁴ See for example the standard agency agreement between a SYA participant and his members' agency (and between a SYA participant and a members' agency which happens also to be the managing agency of one or more of his chosen SYAs) at Byelaw 1 of 1985, Sch. 1; standard sub-agency agreement between a SYA participant's members' agency and the relevant managing agency at Byelaw 1 of 1985, Sch. 2; standard agency agreement between a natural SYA participant and a managing agency at Byelaw 8 of 1988, Sch. 3. On earlier forms of agency agreements, see for example *Hambro v Burnand* [1904] 2 KB 10, 17-18 (Collins MR); *ibid.*, 23 (Romer LJ); *Henderson v Merrett Syndicates Ltd.* [1994] 2 Lloyd's Rep 193, 195 *et seq.* (Saville J). For a 1982 version of the non-standard agreement between a SYA participant and his members' agency, see *ibid.*, 202-207. For a 1978 version of the non-standard sub-agency agreement between that members' agency and each relevant managing agency, see *ibid.*, 208-210.

¹⁵ See Lloyd's Act 1982, s.3.

¹⁶ See the now obsolete Lloyd's Act 1871, s.11 (repealed by Lloyd's Act 1982, s.15(1)(a) and *ibid.*, Sch. 3). An incarnation of that committee was created by Lloyd's Act 1982, s.5.

¹⁷ *McBride v Blackburn (Inspector of Taxes)*, Special Commissioners' Decision, [2003] STC (SCD) 139; *Society of Lloyd's v Jaffray and others* (CA) [2002] All ER (D) 399 (Jul), [2002] EWCA Civ 1101; *Johnson and another v Society of Lloyd's* [2002] All ER (D) 315 (Jul); *Society of Lloyd's v Noel* (CA), [2002] EWCA Civ 937, unreported, 20 June 2002; *Logistic Resources Ltd. v Eastgate Group Ltd.* [2002] EWHC 1229 (Comm), unreported, 19 June 2002; *Society of Lloyd's v Jaffray and others* (CA) [2001] EWCA Civ

recent²⁰ LEXIS search of <Equitas> "and" <reinsurance> does any English court make any adjudication to any such effect. Indeed, the nature of that product (for which the EquitasRe-reinsured SYA participant paid a "premium"²¹) appears never to have been the subject of any relevant controversy or dispute in any English case. In every relevant case, the court appears to have supinely accepted, and never adjudicated, that the RRC 4, §3 product was reinsurance. It may happen to be reinsurance, but only adjudication of its substance, not judicial adoption of its terminology or of its status as externally regulated insurance company, determines its legal nature (many a lawyer has fallen into the trap of describing RTC as a species of reinsurance²²). US federal and state courts should therefore exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re is a reinsurer.

4. Equitas Re "is not a party to original insurance contracts" in "English cases"

The Article, p.1 refers to US litigation in which certain EquitasRe-assureds-at-Lloyd's have "claimed that by reason of the Reinsurance Contract, [Article footnote omitted] Equitas has stepped into the shoes of Lloyd's Underwriters and is therefore liable on insurance contracts to which Equitas is not a party." *Per ibid.*, p.6, "The English cases that have examined R&R and the Reinsurance Contract ... firmly support the [conclusion] ... that ... Equitas is not a party to the original insurance contracts between the policyholders and Lloyd's Underwriters". The representation is presently unsupportable. It may be that Equitas Re may in due course be held by an English court indeed not to be a party to any EquitasRe-reinsured insurance contract — English law presently lacks an established "assumption reinsurance" or

1503, unreported, 8 October 2001; *Society of Lloyd's v Noel* (CA) [2001] EWCA Civ 521, unreported, 30 March 2001; *Society of Lloyd's v Waters* [2001] BPIR 698; *Society of Lloyd's v Noel* (CA), unreported, 31 March 2000; *Thornton Springer v NEM Insurance Co. Ltd. and others* [2000] 2 All ER 489; *Society of Lloyd's v White and others*, *The Times*, 14 April 2000, 144 SJ LB 190; *Mander and others v Equitas Ltd.* [2000] Lloyd's Rep IR 520; *Society of Lloyd's v Jaffray* unreported, 26 January 2000; *Avon Insurance plc and others v Swire Fraser Ltd.* [2000] Lloyd's Rep IR 535; *Amerada Hess and others v CW Rome and others* 144 SJ LB 126, *The Times*, 15 March 2000, 19 January 2000; *Jones v Society of Lloyds*; *Standen v Society of Lloyd's*, *The Times*, 2 February 2000, 16 December 1999; *Price and another v Society of Lloyd's* [2000] Lloyd's Rep IR 453; *Garrow v Society of Lloyd's* (CA), *The Times*, 28 October 1999, [2000] Lloyd's Rep IR 38; *Re a debtor* (No. 544/SD/98) (CA) [2000] 1 BCLC 103; *Garrow v Society of Lloyd's*, *The Times*, 18 June 1999; *Re a debtor* (No 544/SD/98) [2000] 1 BCLC 103; *Society of Lloyd's v Jaffray* [1999] 1 All ER (Comm) 354; *Society of Lloyd's v Fraser and others* (CA) [1999] Lloyd's Rep IR 156; *Baker v Black Sea and Baltic General Insurance Co Ltd (Equitas Reinsurance Ltd. intervening)* [1998] 2 All ER 833, [1998] Lloyd's Rep IR 327 (House of Lords); *Society of Lloyd's v Fraser*, unreported, 4 March 1998; *Society of Lloyd's v Burningham*, unreported, 4 March 1998; *Trygg Hansa Insurance Co. Ltd. v Equitas Ltd.* [1998] 2 Lloyd's Rep 439; *Aneco Reinsurance Underwriting Ltd (In Liquidation) v Johnson & Higgins Ltd.* [1998] 1 Lloyd's Rep 565; *Society of Lloyds v Lyon et al.*, *The Times*, 11 August 1997 (CA); *Manning v Society of Lloyd's*; *Society of Lloyd's v Colfox and others*; *Philips v Society of Lloyd's* [1998] Lloyd's Rep IR 186; *Re Yorke (deceased)*; *Stone v Chataway* [1997] 4 All ER 907; *Society of Lloyd's v Wilkinson (No.2)* unreported, 23 April 1997; *Wynniatt-Hussey v J Bromley (Underwriting Agencies) Plc* unreported, 16 April 1996; *Wynniatt-Hussey v J Bromley (Underwriting Agencies) Plc* [1996] LRLR 312. The appellation "Society of Lloyd's" is erroneous in each case. There is no such entity. The correct name of the entity incorporated by Lloyd's Act 1872, s.3 is Lloyd's *simpliciter*: *ibid.*

¹⁸ Practice Note, Chancery Division, [2001] 3 All ER 765; Practice Note, Queen's Bench (Commercial Court), [1998] 1 Lloyd's Rep 126.

¹⁹ Practice Direction, Chancery Division, [1998] 1 Lloyd's Rep 223.

²⁰ April 4, 2003, 1pm GMT.

²¹ See for example RRC 4, recitals (E) and (K); *ibid.*, §3.1(b) etc.; *ibid.*, Sch. 1, §1, definitions of "Name's Premium" and "Syndicate Premium".

²² See for example *Unisys Corporation v Insurance Company of North America*, Docket No. L-1434-94-S, *Uniroyal Inc. v American Re-Insurance Co.*, Docket No. L-8172-94, Deposition of Stewart Boyd QC, November 15, 1999 and November 16, 1999.

"implied novation" doctrine — but no English court appears to have adjudicated the point. US federal and state courts should exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re is not a party to any EquitasRe-reinsured insurance contract.

5. Equitas Re has "no contractual privity" with EquitasRe-assureds-at-Lloyd's "in English cases"

As part of its argument that an EquitasRe-assured-at-Lloyd's has no contractual rights against Equitas Re, the Article, p.6-7 discusses English privity of contract. *Ibid.*, p.6: "The English cases that have examined R&R and the Reinsurance Contract ... firmly support the [conclusion] ... that ... Equitas has no contractual privity with the policyholders of the Lloyd's Underwriters[.]" The representation is presently unsupportable. It may be that Equitas Re is not in privity with any EquitasRe-assured-at-Lloyd's, but there is no such adjudication in any of the four²³ English cases disgorged in a recent²⁴ LEXIS search of <Equitas> "and" <privity>, or in the sole relevant English case disgorged in a recent²⁵ LEXIS search of <Equitas> "and" <privity>.²⁶ US federal and state courts should exercise caution in acceding to the presently bogus proposition that English law holds that Equitas Re has no contractual privity with an EquitasRe-assured-at-Lloyd's.

6. Equitas Re "not bound by the terms" of EquitasRe-reinsured insurance contracts in "English cases"

The Article, p.6, represents: "The English cases that have examined R&R and the Reinsurance Contract ... firmly support the [conclusion] ... that ... Equitas is not bound by the terms of the insurance contracts between the policyholders and Lloyd's Underwriters" The representation is presently unsupportable. It may be that Equitas Re is not bound by the terms of any EquitasRe-reinsured contract, but English law does not presently so hold.

The proposition is controversial in principle. Which terms of which underlying insurance contracts govern Equitas Re's performance, to EquitasRe-reinsured SYA participants, of its RRC 4, §3 reinsurance obligations and its *ibid.*, §9 run-off agency obligations, if not the relevant terms of each EquitasRe-reinsured insurance contract? No R&R instrument furnishes any other relevant contracts or terms determinative of (as appropriate) Equitas Re's relevant reinsurance liability or its run-off agency functions, which is presumably one reason why Equitas Re seeks to be a third-party beneficiary of releases granted in settlement agreements by EquitasRe-assureds-at-Lloyd's to EquitasRe-reinsured SYA participants. US federal and state courts would fall into error in acceding to the presently bogus proposition that Equitas Re is not bound to observe, or that it has been held by English law not to be bound by, relevant provisions of EquitasRe-reinsured insurance contracts.

²³ *Lloyd's v Jaffray* [2002] All ER (D) 399 (Jul), [2002] EWCA Civ 1101 (CA); *Thornton Springer v NEM Insurance Co. Ltd.* [2000] 2 All ER 489; *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA); *Lloyd's v Wilkinson (No. 2)* unreported, April 23, 1997.

²⁴ April 9, 2003, 12pm GMT.

²⁵ April 4, 2003, 1pm GMT.

²⁶ *Lloyd's v Fraser* [1999] Lloyd's Rep IR 156 (CA).

7. Equitas Re "is not subject to a breach-of-contract action" in "English cases"

The Article, p.6, states: "The English cases that have examined R&R and the Reinsurance Contract ... firmly support the [conclusion] ... that ... Equitas is not subject to a breach-of-contract action by the policyholders." The representation is presently unsupportable. It may be that Equitas Re is not subject to a breach-of-contract action by an EquitasRe-assured-at-Lloyd's, but English law does not so hold.

The proposition should be examined in principle in relation to Equitas Re's exercise not of its RRC 4, §3 reinsurance functions — the EquitasRe-reinsured SYA participant has assigned his relevant rights against Equitas Re as RRC 4, §3 reinsurer to Equitas Policyholders Trustee Ltd.²⁷ in any event — but of its *ibid.*, §9 run-off agency functions. The EquitasRe-reinsured SYA participant, just like the SYA participant ordinarily at Lloyd's, is contractually²⁸ prohibited from interfering in the running off of his own insurance business. In addition, Equitas Re (like a managing agency ordinarily at Lloyd's) never informs him of any relevant day-to-day technical, financial, legal or commercial aspect of that run-off. Though he will ordinarily never know — from Equitas Re or any other source — nor will he ever wish to know, of any relevant misconduct by Equitas Re which could found a RRC 4, §9 breach-of-contract action by him against it in the first place, the unpaid claimant EquitasRe-assured-at-Lloyd's will not always be so fortunate, and may well wish to pursue Equitas Re for bad-faith claims handling. Whether he will be able to do so in contract under English law is not presently covered by English authority.

Equitas Re itself appears to recognise that, as a general matter, it is not irrelevant to disputes involving EquitasRe-reinsured SYA participants. The Article's reliance, at *ibid.* p.11, on the words "[English law] does not permit the assignment of liabilities" extracted from *Baker v Black Sea and Baltic General Insurance Co. Ltd.* [1996] LRLR 353, 361 (Millett LJ) is not to its advantage or to its credit. For example: (1) Equitas Re was not a party to the Court of Appeal proceedings; (2) the peculiarities of any type of RTC were not in controversy in that case; (3) the Article omits to quote relevant preceding words,²⁹ which make clear that the judge's non-adjudicatory allusion to the English law of assignment was in the context of annual re-signing at Lloyd's, not RRC 4; (4) the Article fails to mention that, far from supporting the notion that Equitas Re is not a relevant party in relation to EquitasRe-reinsured insurance contracts, Lord Lloyd — when the case was heard on appeal in the House of Lords³⁰ — appears to have been sympathetic to the apparently uncontroversial notion that Equitas Re, which had chosen to intervene personally in that appeal, was indeed a relevant party.³¹

²⁷ See for example RRC 4, §4.1; and see the contemporaneous Equitas Policyholders Trustee trust deed (Astor Classification Number RRC 7). The RRC 4, §4 assignment does not include rights against Equitas Re for actionable performance of its *ibid.*, §9 run-off agency functions.

²⁸ See RRC 4, §9.4 (EquitasRe-reinsured SYA participant). There are similar provisions governing the SYA participant ordinarily at Lloyd's: see for example SUA 1, §7.3.

²⁹ See *Baker v Black Sea* [1996] LRLR 353, 360-361:-

It is a requirement of Lloyd's that policies which last for more than one year are subject to annual re-signing. ... [I]t takes the form of an annual reinsurance The transaction probably only takes the form of reinsurance rather than assignment because English law does not permit the assignment of liabilities.

³⁰ [1998] 1 WLR 974; [1998] Lloyd's Rep IR 327; [1998] 2 All ER 833.

³¹ See *Baker v Black Sea* [1998] 1 WLR 974, 978-979:-

I should mention an important development which has occurred since the case was before the Court of Appeal. In September 1996 the offer which had been made to members of Lloyd's as part of the reconstitution scheme became unconditional. That meant that a company called Equitas Reinsurance Ltd (Equitas)

Part III: Reinsurance-to-close

8. conventional RTC and EquitasRe-RTC confused

The Article, p.13 states: 'Some policyholders argue that Equitas is directly liable to them because the Reinsurance Contract between the Names and Equitas is like the Lloyd's practice of "reinsurance to close." That argument misses the mark.' That is correct. Some self-professedly expert US assured-side lawyers have indeed expressed the view that Equitas Re is personally liable to an EquitasRe-assured-at-Lloyd's because RRC 4 was a form of RTC.

The argument appears to be based on confusion between conventional RTC³² and EquitasRe-RTC.³³ The Article itself confuses³⁴ the two. Their principal shared incident is the closure of outward-RTCd SYA participants' relevant accounts. In other respects, the two forms are materially different. Whereas conventional RTC does extricate the conventionally outward-RTCd SYA participant from all liability in relation to the conventionally outward-RTCd insurance contract, and does infiltrate liability therefor into the accounts of the conventionally inward-RTCing SYA participant, EquitasRe-RTC does not. EquitasRe-RTC appears to have been deemed by the Council of Lloyd's to be a form of RTC only for SYA closure purposes, not for extrication-infiltration purposes, the essence of RTC being the *retention* — including when RTC has been sold by a body not comprising SYA participants³⁵ — of the RTCed liability within the financial responsibility and responsiveness of the *Lloyd's* enterprise.

R&R's populist concept of "finality"³⁶ for, and various R&R formal releases³⁷ of, the EquitasRe-reinsured SYA participant, though suggestive of conventional RTC-type extrication — and thus suggestive of infiltration into Equitas Re — are a different point entirely. They relate not to the EquitasRe-reinsured SYA participant's extrication — and still less to the Lloyd's enterprise's extrication — but to the Lloyd's enterprise's intentional, politically motivated self-improvement.

There appears to be no RTC-based ground on which the EquitasRe-assured-at-Lloyd's can properly sue Equitas Re; nor should he do so if to do so successfully would supplant any

took over the rights and liabilities of all members in respect of the 1992 year of account and prior years, for a premium in excess of £14bn. Equitas now has the responsibility, as equitable assignee, of pursuing claims by members against their reinsurers, including the syndicate's claim in the present proceedings. ... Because of its market-wide interest in the outcome of the present proceedings Equitas petitioned the House for leave to intervene in May 1997, and your Lordships granted leave shortly thereafter. In their written case the interveners indicated that they would be content to adopt the submissions advanced by the syndicate in the syndicate's written case. By agreement it was Mr Boyd QC, for the interveners, who opened the case on behalf of the syndicate

And see for example *Mander v Equitas Ltd.* [2000] Lloyd's Rep IR 520 (Morison J).

³² A partial, misleading definition is at Syndicate Accounting Byelaw (No. 18 of 1996), Sch. 1, §1, definition of "reinsurance to close", §(a).

³³ A partial, misleading definition is at Syndicate Accounting Byelaw (No. 18 of 1996), Sch. 1, §1, definition of "reinsurance to close", §(d).

³⁴ See the confusion at Article, p.13: "The fundamental point ... is that neither Lloyd's reinsurance to close nor the Equitas transaction transfers to the reinsurer any of the reinsured insurer's liability to the policyholders." Conventional RTC does so transfer; EquitasRe-RTC does not.

³⁵ For example, outward RTC sold by Lioncover Ltd. is characterised by Corporation indemnification of Lioncover, ensuring the retention of the Lioncover-RTCd liabilities within the Lloyd's enterprise.

³⁶ See for example relevant parts of *Settlement Offer Document* (Lloyd's, July 1996).

³⁷ See (for example) the various releases set out in the Settlement Agreement (Astor Catalogue Number RRC 1) at *Settlement Offer Document* (Lloyd's, July 1996), App. 1.

EquitasRe-reinsured SYA participant and thus deprive the plaintiff of his recourse to relevant funds at the Lloyd's enterprise, assuming such funds exist in relevant quantity in the first place. Rather — and this point demonstrates the difference between conventional RTC and EquitasRe-RTC — the EquitasRe-assured-at-Lloyd's sues the EquitasRe-reinsured SYA participant in the ordinary way, and, if successful, collects not against each or any SYA participant personally but solely, and for 100% of the judgment, against one or more expressly available claims payment trust funds and, when those trust funds are no longer available, there are funds at the Lloyd's enterprise such as the Central Fund which are *arguably* available to pay him 100%.

9. Conventional RTC: what English law "holds"

In attempting to describe what English law "holds", the Article, p.13, states: "Reinsurance to close is a process through which a Lloyd's syndicate reinsures its entire business for a particular year of account, usually by an agreement with the Names who are members of the syndicate in a later year." The passage is multiply infelicitous. For example:-

(1) As authority for the above-quoted proposition, the Article, footnote 111 cites solely to *Lloyd's v Clementson* [1997] LRLR 175, 216 (Cresswell J). The Article thereby suggests, and an otherwise uninformed reader is likely to infer, that conventional RTC was held in that case to be reinsurance. In reality, the nature of conventional RTC was not disputed, argued or adjudicated in *Clementson*. Cresswell J's *op. cit.*, 216 *obiter* excursus on conventional RTC is neither authoritative nor authority for the proposition that conventional RTC is (or is not) any form of reinsurance.³⁸

(2) a "syndicate" properly so called has no "business", including "business" capable of being reinsured. A syndicate is a regulatory concept, and an entrepreneurial idea in the mind of a managing agency. Notwithstanding various misconceived US federal jurisprudence concerning diversity jurisdiction over "syndicates", a syndicate does not sell insurance or otherwise trade.

(3) a syndicate properly so called is incapable of having members or participants.³⁹ A member of Lloyd's sells insurance at Lloyd's as an semi-automatic consequence of deploying premium income limit (never cash) on one or more particular chosen YAs of one or more particular chosen syndicates.

(4) the use of the word "year" *simpliciter* at Lloyd's is meaningless given the calendar year, the underwriting year,⁴⁰ the year of account,⁴¹ and a YA's year of operation.

³⁸ As discussed elsewhere in the present article, conventional RTC is incapable of being reinsurance because (for example) the conventionally outward-RTCD SYA participant is incapable of ever suffering a relevant loss.

³⁹ Even the profoundly unsatisfactorily drafted FSA Lloyd's Rulebook (the so-called FSA Lloyd's Sourcebook ("LLD")) now speaks (almost accurately) of "syndicate years" rather than "syndicates": see for example FSA Handbook Glossary, definition of "syndicate year". And see similarly the definition of "Syndicate" at RRC 4, Sch. 1, §1.

⁴⁰ The insurance equivalent of the financial year. At Lloyd's, presently January 1 to December 31.

⁴¹ Not a time period but a collectivisation device to enable members of Lloyd's to deploy premium income limit collectively.

10. Conventional RTC "described under English law"

The Article, p.13-14, represents that "[r]einsurance to close is described ... under English law as follows" followed by a quotation attributed, at *ibid.*, footnote 113, solely to *Henderson v Merrett* [1997] LRLR 247, 277 (Cresswell J). That sole cite appear to seek to indicate, and an otherwise uninformed reader is likely to infer, that that case judicially adjudicated on conventional RTC. In reality, the quote appears to be merely a judicial précis of a mere contractual provision⁴² promulgated by the Council of Lloyd's. Indeed, neither conventional RTC as such nor that contractual provision in particular was the subject of relevant dispute, argument or judicial consideration in *Merrett*. "[U]nder English law" is therefore inaccurate and misleading.

11. Conventional RTC in "English law": Financial Services Authority opinion

The Article, p.14 represents that "English law supports the decisions of the majority of American courts that labeling the Reinsurance Contract as "reinsurance to close" does not render Equitas liable to the policyholders on their underlying insurance contracts with Lloyd's Underwriters." In support of that proposition, *ibid.*, p.14 quotes the following text:-

"In the opinion of the FSA, where an insurer agrees to meet the liabilities (this may include undertaking the administration of the policies) of another insurer by means of a reinsurance contract, including Lloyd's reinsurance to close, this would not constitute an insurance business transfer because the contractual liability remains with the original insurer."

The Article's reliance on that quote is multiply infelicitous. For example:-

(1) the source document's correct title is not "Financial Services Authority, Insurance Business and Friendly Society Transfers" (Article, fn. 116) but "Supervision".

⁴² See (for example) Syndicate Accounting Byelaw (No. 18 of 1994), Sch. 1, §1, definition of "reinsurance to close" (*italics added*), which provides (so far as presently relevant):-

"reinsurance to close" means ... (a) an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will *discharge or procure the discharge of*, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) ... (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business)[.]

Compare the above — the Lloyd's rulebook contains other, similar definitions of conventional RTC — with the Article's *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 265, 277 text:-

"Reinsurance to close" ... means an agreement under which underwriting members who are members of a syndicate for a year of account agree with underwriting members who comprise that or another syndicate for a later year of account that the reinsuring members will indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year, in consideration of a premium and the assignment to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business.

(2) the Article chooses to give a materially incomplete paragraph reference. The correct paragraph reference is "18.1.5[G]". The "G" signifies that the text, self-evidently mere opinion,⁴³ has the status only of guidance, not rule. It has no legal status whatever.

(3) even if the FSA opinion had legal status so far as it went, it does not go very far. The words "this would not constitute an insurance business transfer because the contractual liability remains with the original insurer" appear to be attempting to express the limited view that a conventional RTC contract, whatever may be its inherent, inescapable, inalienable, invariable, ineradicable, irrevocable back-office extrication-and-infiltration effects, happens not to be an "insurance business transfer" in accordance with an "insurance business transfer scheme" as those phrases are defined in the FSA Handbook Glossary. As to those effect themselves, the FSA opinion appears to be expressing no view at all, in "English law" or otherwise.

(4) in any event, the Article appears⁴⁴ to be claiming that the FSA opinion addresses the peculiar type of deemed RTC effected by RRC 4.⁴⁵ There is no suggestion whatever in FSA: Supervision, Chapter 18 ("Transfers of Business") that the FSA is addressing any type of RTC other than conventional RTC. The FSA's opinion may happen to apply *a fortiori* to EquitasRe-RTC, but it does not express any view on the point. As the present article mentions elsewhere, the more that an EquitasRe-reinsured liability can be considered to remain with the EquitasRe-reinsured SYA participant, the more irrelevant becomes Equitas Re to the EquitasRe-assured's-at-Lloyd's right to recourse to the Lloyd's enterprise for 100% of his valid claim and for performance of 100% of any commutation formally agreed with EquitasRe-reinsured SYA participants.

12. Conventional RTC as reinsurance "[u]nder English law"

The Article, p.14, represents that "[u]nder English law the process of reinsurance to close is still reinsurance". The Article particularly represents, at *ibid.*, p.14, that (the italics were added by the Article's authors):-

[u]nder English law the process of reinsurance to close is still reinsurance whereby "reinsuring members *agree to indemnify* the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through the managed syndicate and allocated to the earlier year."

That is multiply infelicitous. For example:-

(1) The Article, footnote 114, attributes the above quote solely to *Lloyd's v Clementson* [1997] LRLR 175, 216 (Cresswell J). That sole cite appears to seek to indicate, and an otherwise uninformed reader is likely to infer, that the quote is a judicial dictum. In reality, the

⁴³ The Article's authors' law firm appears to eschew even soundly-based technical opinion — indeed, any text where the writer has no direct personal experience of what he is writing about — which also excludes, among most of the world's factual literature, the judicial opinions of almost all judges and lawyers.

⁴⁴ *Ibid.*, p.14: "English law supports the decisions of the majority of American courts that labeling the Reinsurance Contract as "reinsurance to close" does not render Equitas liable ...".

⁴⁵ See for example RRC 4, recital (F) ("The Council has resolved that a reinsurance contract with [Equitas Re] in the terms of this Agreement (alone or, in the case of any Syndicate which includes business other than 1992 and Prior Business, taken together with another designated contract or contracts of reinsurance) will constitute reinsurance to close as at the Inception Date").

quote is merely a judicial précis of a mere contractual provision⁴⁶ promulgated by the Council of Lloyd's. Neither conventional RTC nor the quoted text was the subject of relevant dispute, argument or judicial consideration in *Clementson*. "Under English law" is inaccurate and misleading.

(2) the Article appears to have misunderstood (and quotes selectively) the very words — "agree to indemnify" — on which it seeks especially to rely. Conventional RTC cannot be a contract⁴⁷ of indemnity, because its principal effect is to render the conventionally outward-RTCd SYA participant incapable of ever actually suffering, or procedurally dealing with, a relevant loss. For example, he is never the subject of any claim on any outward-RTCd insurance contract; can never pay it even if he wished to do so (including by way of supplementing any shortfall in the outward RTC premium); can never claim on any outward RTC; can never be reimbursed by any inward-RTCing SYA participant (including by way of refund for an excessive inward RTC premium); can never be pursued under any agency agreement (including by way of cash call) for any part of the claim; and can never be pursued under any trust deed for relevant personal-use funds (such as personal reserve and Lloyd's deposit). No indemnification ever occurs, whether by reimbursement or otherwise.

The Council of Lloyd's appears regulatorily to have recognised these elementary dynamics — the contractual bases for which are alluded to later in the present article — when promulgating the words "discharge or procure the discharge of" in the Syndicate Accounting Byelaw's definition of conventional RTC, which definition reads (so far as presently relevant; *italics added*):-

an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will *discharge* or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account

Like RTC other "reinsurance" paraphernalia such as a "premium" (in reality a reserve⁴⁸) and its historical processing at Lloyd's Policy Signing Office,⁴⁹ indemnity is misleading as to conventional RTC's true nature.

⁴⁶ See for example Syndicate Accounting Byelaw (No. 18 of 1994), Sch. 1, §1, definition of "reinsurance to close", §(a).

⁴⁷ On the notion that conventional RTC is a contract of indemnification, see also (for example) *Aiken v Stewart Wrightson Members Agency Ltd.* [1995] 2 Lloyd's Rep. 618, 622 (more complicated RTC contracts have recently been devised in relation to corporate SYA participants):-

IN CONSIDERATION of the payment to us of a sum of • the receipt of which amount we hereby acknowledge, we hereby undertake each for his own part and not one for another, to pay and make good in the proportions shown below against our respective Names all Claims, Returns, Reinsurance Premiums and the like taken down on and after 1st January [year], against the [UY] Underwriting Account of Syndicate • PROVIDED ALWAYS that there shall be paid to and retained by us all Premiums, Salvages, Re-funds and Reinsurance Recoveries which may be taken down on behalf of the Reassured Account on and after the 1st January [year].

⁴⁸ See for example Syndicate Accounting Byelaw (No. 18 of 1994), Sch. 1, §1, definition of "reinsurance to close", §(f).

⁴⁹ See for example Reinsurance to Close Byelaw (No. 6 of 1985), §3 ("...[E]very reinsurance to close shall be evidenced by a contract in writing which shall not later than twelve months after the date as from which such reinsurance to close takes effect be presented by a Lloyd's broker or the managing agent of the reinsured members for signing, embossment and dating at LPSO").

13. Conventional RTC considered

Of the six⁵⁰ types of RTC established at Lloyd's, it may be useful to briefly consider conventional RTC. The Article omits to mention that *Clementson* — erroneously relied on by the Article as English authority that conventional RTC is mere reinsurance — alludes to the true nature of that elusive transaction:

A Name has been regarded by the DTI as ceasing to conduct insurance business when all his open years have been closed by RITC. Because RITC is treated as ending a Name's involvement in a syndicate for regulatory and tax purposes, it is effectively the mechanism whereby a Name is able to be released from his membership of Lloyd's.⁵¹

The Article omits to mention a similar passage in another of its relied-on cases, *Hayter v Nelson*.⁵² That extrication (the very reason for the Council of Lloyd's promulgating the Reinsurance to Close (Restriction) Byelaw⁵³), and the corresponding infiltration, are best de-

⁵⁰

RTC is incompletely and misleadingly defined at (for example) Syndicate Accounting Byelaw (No. 18 of 1994) as amended, Sch. 1, §1 as any of the following:-

(a) an agreement under which underwriting members (the "reinsured members") who are members of a syndicate for a year of account (the "closed year") agree with underwriting members who constitute that or another single syndicate for a later year of account (the "reinsuring members") that the reinsuring members will discharge or procure the discharge of, or indemnify the reinsured members against, all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year of account, in consideration of: (i) a premium; and (ii) either (aa) the assignment, or agreement to assign, to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business (including without limitation the right to receive all future premiums, recoveries and other monies receivable in connection with that insurance business); or (bb) an agreement by the reinsured members that the reinsuring members shall collect on behalf of the reinsured members the proceeds of all such rights and retain them for their own benefit so far as they are not applied in discharge of the liabilities of the reinsured members;

(b) an agreement underwritten by members of one or more syndicates and complying with requirements made under paragraph 2(3) of this byelaw;

(c) a syndicate run-off reinsurance contract between members of a syndicate for a year of account and Centrewrite Limited, Lioncover Insurance Company Limited, Equitas Reinsurance Limited or any other insurance company which is designated by the Council for the purposes of this definition and is either authorised under the Insurance Companies Act 1982 or an EC company whereby that insurance company agrees to indemnify the members of the syndicate for that year of account against all known and unknown liabilities arising out of insurance business underwritten through the syndicate and allocated to that year of account;

(d) in relation to the 1992 year of account or any earlier year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract; ...

(e) in relation only to the 1993 year of account, 1994 year of account or 1995 year of account of any syndicate whose members have underwritten general business, the Equitas Reinsurance Contract, taken together with an agreement such as is referred to in sub-paragraph (a) modified so as to reinsure the reinsured members in relation only to such of the insurance business underwritten through that syndicate and allocated to that year of account as has not been reinsured under the Equitas Reinsurance Contract; or

(f) in the case of a syndicate consisting only of a single corporate member which is not closed by reinsurance to close by another person, the inclusion in the underwriting account of that syndicate for the next following year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing; and for the purposes of this byelaw, the amount representing such provision shall be treated as premium in respect of such reinsurance to close[.]

⁵¹

Lloyd's v Clementson (No. 2) [1997] LRLR 175, 216 (Cresswell J).

⁵²

In *Hayter v Nelson*, unreported, September 14, 1989, LEXIS (Evans J), the judge quotes Kiln as indicating that RTC does involve such extrication: "Mr Kiln proceeded to hold that, so far as the two parties to the reinsurance agreement were concerned, this was indeed intended to be a reinsurance to close, that is to say that it was intended that the plaintiff syndicates' Names should be relieved of further liability so that, inter alia, their deposits could be released."

⁵³

Byelaw 15 of 1993, passed when (among other things) the Council of Lloyd's and relevant managing agencies were no longer able to deceive SYA participants any further as to the toxic financial infiltration consequences of conventional inward-RTC. SYA participants thus trapped on run-off SYAs were the most

scribed in the following SUA 1 provisions, which express prior relevant customary practice at Lloyd's. They are dispositive of conventional RTC however much a court may be misdirected to the contrary (and whether or not conventional RTC effects novation as such is completely beside the point). The Article does not allude to any of them, though (as discussed elsewhere in the present article) it does quote, and attribute bogus jurisprudential status to, other Lloyd's contractual provisions.

The Article's failure to mention any of the following provisions recalls a recent deposition — apparently now claimed by Equitas Re to be conventional RTC's *locus classicus* — seeking to deal in detail with conventional RTC in which the deponent, a prominent English Queen's Counsel specialising in insurance law, having expressed the firm view that conventional RTC was reinsurance, was asked: "Does the Lloyd's agency agreement refer in any way to reinsurance to close?". He answered, "I shouldn't be surprised but I haven't looked at it recently and I don't know sorry."⁵⁴ Why these provisions have been pandemically ignored may become one of the curiosities of malpractice jurisprudence.

(1) SUA 1, §9.2A:-

A decision by the Agent to close a year of account in accordance with clause 5(ad) shall be effected by the Agent by the inclusion in the underwriting account of the Managed Syndicate for the next succeeding year of account of an amount representing a provision for all known and unknown liabilities attributable to the year of account which is closing.

Infiltration of the conventionally inward-RTCed liability is effected under this provision. The transfer is effective for all back-office purposes including cash calls, cash call statements, funding from the SYA participant's premiums trust fund, and drawdown from his Lloyd's deposit, personal reserve fund and other funds at Lloyd's.

(2) SUA 1, §7.4:-

The Name acknowledges that risks underwritten at a time when he was not a member of the Managed Syndicate (whether by reinsurance to close or under clause 8 or otherwise) may be included as liabilities of the Managed Syndicate and the Name hereby agrees that he will be bound by the manner of the Agent's accounting treatment of any such risks.

Under this provision, the conventional inward-RTCing SYA participant consents to full infiltration. If the inward-RTC "premium" is too much, in principle he takes the benefit, and the outward-RTCed SYA participant has no recourse to the inward-RTCing stamp for any surplus (in practice, the managing agency manipulates the premium to show a "profit" or "loss" depending on circumstances). If the inward-RTC premium is insufficient, and relevant SYA participants' funds are insufficient to make up the deficit, the managing agency may choose to make a cash call on the inwards, who have no recourse to any outward for the deficiency.

(3) SUA 1, §9.2:-

vociferous in insisting that the settlement offer that eventually became the Settlement Agreement (Astor Catalogue Number RRC 1) did contain the "finality" apparently inherent in some form of outward RTC.

⁵⁴ *Unisys Corporation v Insurance Company of North America*, Docket No. L-1434-94-S, *Uniroyal Inc. v American Re-Insurance Co.*, Docket No. L-8172-94, Deposition of Stewart Boyd QC, November 15, 1999 and November 16, 1999. p.184.

A decision by the Agent to close a year of account ... shall be effected by the Agent, through the active underwriter of the Managed Syndicate or some other duly authorised officer of the Agent, executing a written memorandum of the terms of the contract of reinsurance to close. Upon the execution of the memorandum the contract of reinsurance to close shall be binding on the reinsuring members and the reinsured members. . . , and after such execution the Agent shall have no authority to cancel or vary the contract of reinsurance to close.

Conventional RTC's extrication-infiltration effects are immutable and irreversible. The assured-at-Lloyd's could not collect against a conventionally outward-RTCD SYA participant in the (presumably rare) event that he was ever (wrongly) advised that it was in his financial interest to do so, because after extrication there is no mechanism at Lloyd's to fix him with any relevant liability. Indeed, business at Lloyd's could not be conducted if any conventionally outward-RTCD SYA participant were to be resurrected into the financial matrix.

(4) SUA 1, §5(e) empowers the managing agency to:-

determine (subject to any requirements of the Council) to which year of account the benefit and burden of any contract of insurance should belong, irrespective of the date of acceptance of a risk or the signing of a policy.

This provision, though not essential for conventional RTC's extrication-infiltration effects, further indicates that allocation of a particular insurance liability to a particular SYA stamp is not immutable, especially in relation to the relevant accounts of an *originalis*.

(5) SUA 1, §3(p) empowers a managing agency to:-

run off the business of the Managed Syndicate in respect of any year of account until such time as the liabilities arising out of that business are covered by reinsurance to close.

The provision deprives the conventionally outward-RTCD SYA participant of a managing agency empowered to run off the conventionally outward-RTCD insurance contracts.

Part IV: The liability of SYA participants

14. Liability of the conventionally outward-RTCD *originalis* "under English law"

The Article, p.14, states:-

... [U]nder reinsurance to close, the Names subscribing to the original policies of insurance remain liable to the policy-holders on those policies because under English law "no such agreement can relieve those original Names of their liability to policyholders."

The passage is multiply infelicitous. For example:-

(1) the Article, footnote 115, attributes the words in quotation marks to *Hayter v Nelson*, unreported, September 14, 1989 (Evans J). The snippet is not authoritative, still less authority, on any aspect of conventional RTC as actually operated at Lloyd's. The sentence in the judgment actually reads: "As Mr Kiln [the arbitrator] points out, no such agreement can relieve the original Names of their liability to policy holders". It is not clear from the judgment

whether the "agreement" referred to by the arbitrator is reinsurance (which was the subject of the case), or conventional RTC (which was not). The judge's approbation of the arbitrator aside, the nature of conventional RTC was in any event not in issue in the case, nor the subject of any argument, nor judicially considered, nor adjudicated.⁵⁵ The judge particularly did not consider the relevant managing agency agreement provisions (mentioned elsewhere in the present article) under which the conventionally outward-RTCed SYA participant is necessarily comprehensively extricated from, and positively prevented from having anything to do with, any of his conventionally outward-RTCed liabilities.

(2) even if *Hayter* purported to adjudicate conventional RTC's extrication incident, which it does not, any conclusion that extrication was not effected would be wholly unsustainable. Were a purist English court to hold that conventional RTC does not in effect novate the underlying insurance contract, it would thereby deprive the assured-at-Lloyd's—who presumably consents to the rule-based and customary practice of conventional RTC—of such particular securitisation as is inherent in conventional RTC's transposition to a fresh SYA participant supposedly with captive funds at Lloyd's (and the Council of Lloyd's semi-automatic deployment of the Central Fund in default), and impose upon him the insecurity inherent in a former Member long dead, untraceable, impecunious and without a managing agency. No rational court would so hold.

(3) the Article, footnote 115, also cites to *Clementson*, 201, which, according to the footnote, "recogniz[es] that the Names who underwrote the original policy are still liable after reinsurance to close". Neither conventional RTC nor the front- or back-office contractual liability of a conventionally outward-RTCed *originalis* was in issue, or the subject of any argument, or judicially considered, or adjudicated, in *Clementson*, including at *ibid.*, 201, which page does not contain the formulation "the Names who underwrote the original policy are still liable after reinsurance to close" or any text resembling it. If the Article does mean to refer to *Clementson*, 201, that reference indicates that the Article's authors appear to have misunderstood conventional RTC. Because of the latter's comprehensive-extrication-and-infiltration incidents, neither the funds at Lloyd's nor the "chain of security" discussed at *op. cit.*, 201, is ever used to meet the liabilities of any conventionally outward-RTCed SYA participant. Indeed, because of conventional RTC's extrication incident, there is no back-office mechanism at Lloyd's whereby any such recourse (which would defeat the purpose of conventional RTC) could practicably be effected.

The principle applies not only to every conventionally outward-RTCed *originalis* but to every subsequent generation of conventionally outward-RTCed SYA participant.

15. "[T]he Names retain full liability to the policyholders"

The Article, p.8 (and see generally *ibid.*, p.7-9) represents that "the Names retain full liability to the policyholders". This appears to be a variation on the Article's *originalis*-based theme that the assured-at-Lloyd's must recourse to a SYA participant personally. In citing to *Re Yorke* and other cases, and (at *ibid.*, p.7) to RRC 4, recital (J),⁵⁶ the Article appears to seek to suggest that the EquitasRe-assured-at-Lloyd's must collect from the EquitasRe-reinsured SYA participant (and that the latter is susceptible to a collection action by the for-

⁵⁵ And see the related *Hayter v Nelson* [1990] 2 Lloyd's Rep. 265 (Saville J).

⁵⁶ RRC 4, recital (J) provides: "This agreement is to take effect as a contract of reinsurance and shall have no effect on the liability of any Name or Closed Year Name under any original contract of insurance entered into by such Name or Closed Year Name". The Article, p.7 appears to seek to give the impression that the recital is an operative provision of RRC 4. It is not.

mer). The apparently genuine apprehension of the *Re Yorke* and *Leighs* courts and the Article that the assured's-at-Lloyd's recourse is truly to each individual relevant SYA participant individually suggests profound ignorance of the front office and the back office at Lloyd's. It is correct that the EquitasRe-reinsured SYA participant does retain a certain liability on each of his EquitasRe-reinsured insurance contracts, but not in the direct-recourse sense insinuated by the Article. He is not a collection object.

(1) As a front-office matter, from the EquitasRe-assured's-at-Lloyd's perspective, for collection (and, presumably, coverage before that) to be solely at the level of a dead insolvent individual EquitasRe-reinsured SYA participant, resident before his death in Ivory Coast, with a £72.31 gross liability on a particular EquitasRe-reinsured insurance contract, would render commerce at Lloyd's ridiculous. Far from providing the EquitasRe-assured-at-Lloyd's with front-office recourse to himself, the EquitasRe-reinsured SYA participant is (however eviscerating the EquitasRe-reinsurance premium) and remains (however dead, untraceable or impecunious) the EquitasRe-assured's-at-Lloyd's *conduit* to certain relevant funds at the Lloyd's enterprise, providing the latter with recourse to a variety⁵⁷ of expressly⁵⁸ and arguably⁵⁹ available common-use claims payment trust funds (a discussion of which is outside the present article's scope), furnished by the Lloyd's enterprise, as required by numerous external insurance regulatory authorities in numerous jurisdictions, in order specifically to obviate the absurdity of front-office collection from any individual SYA participant personally. For example, the Lloyd's US Surplus Lines Common-Use Trust Fund pays out 100% of a claim if the EquitasRe-assured-at-Lloyd's obtains a final judgment against a relevant SYA participant;⁶⁰ not so if the judgment has been obtained against Equitas Re. If the correct trust is correctly accessed, the trustees cut a check to the assured-at-Lloyd's for 100% of the judgment debt.

(2) as a back-office matter, the EquitasRe-reinsured SYA participant himself will typically have been released (as discussed elsewhere in the present article) from all liability to provide any back-office funds in relation to any EquitasRe-reinsured liability; nor is he under the slightest external insurance regulatory obligation to maintain any assets for any purpose in any jurisdiction. The SYA participant's cufflinks are vulnerable⁶¹ only in the back office (*viz.*,

⁵⁷ Such funds can be categorised by (for example): (1) specificity of SYA participant, *viz.*, personal-use and common-use (usually at Lloyd's, confusingly and inaccurately, "several asset" and "joint asset" respectively); (2) availability, *viz.*, expressly available and arguably available; (3) type of claimant or currency, *viz.*, dedicated and not dedicated. The terms of each relevant trust instrument are beyond the present article's scope. Some are treated in detail at *Astor's Equitas Re Handbook*, others in *Astor's Law of Lloyd's*, 2nd Ed.

⁵⁸ For example, Lloyd's US Surplus-Lines Common-Use Trust Fund; Lloyd's US Credit-for-Reinsurance Common-Use Trust Fund. Each Lloyd's American Trust Fund is a personal-use fund.

⁵⁹ For example, New Central Fund (see New Central Fund Byelaw (No. 23 of 1996), §8); the (other) personal assets of Lloyd's (see Lloyd's Act 1911, s.7(c); Old Central Fund Byelaw (No. 4 of 1986), §8). Lloyd's Act 1911, s.7: "The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes: ... (c) for making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's which in the opinion of the Council it is in the interests of the members of the Society to make good[.]"

⁶⁰ Lloyd's US Surplus-Lines Common-Use Trust Deed, §2.3(a) (a relevant judgment against a relevant "Underwriter" — *per ibid.*, §1.22, "Underwriters" means "underwriters at Lloyd's London and such former underwriters at Lloyd's London as continue to have underwriting business at Lloyd's not fully wound up and the personal representatives or trustee in bankruptcy of any such underwriter or former underwriter who has died or become bankrupt"). See similarly Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, §2.3(a) and *ibid.*, §1.12.

⁶¹ See for example *Marchant & Eliot Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep 31 (CA); *ibid.*, [1996] 1 Lloyd's Rep 313 (Rix J); *Boobyer v David Holman & Co. Ltd. and Lloyd's (No. 2)* [1992] 1 Lloyd's Rep 96 (Saville J); *Garrow v Lloyd's* [2000] Lloyd's Rep IR 38, 40 (Robert Walker LJ); *Price and*

to members' agencies, managing agencies, Lloyd's, etc.) never in the front office (*viz.*, to an assured-at-Lloyd's).

The FSA appears to share both the above pragmatic approach and also the Article's own logic that Equitas Re and its impecuniosity are completely irrelevant to the EquitasRe-assured's-at-Lloyd's right to collect 100% of a valid claim *at the Lloyd's enterprise*. Under the extraordinary circumstances of R&R, one would have thought that if direct collection had been intended, the FSA (and its relevant predecessor, the DTI) would have imposed meaningful relevant financial requirements on each EquitasRe-reinsured SYA participant and his personal representatives and heirs, and relevant SYA-participant-specific accounting requirements on Equitas Re. Equitas Re is believed presently to maintain no relevant records. As it is presently, the FSA register of EquitasRe-reinsured SYA participants presently is merely of such addresses, real or false, as registrants choose to provide.

The Lloyd's enterprise itself has indeed put itself in a difficult funding position. Those R&R releases mean that the typical⁶² EquitasRe-reinsured SYA participant remains the EquitasRe-assured's-at-Lloyd's front-office conduit to relevant funds at the Lloyd's enterprise, yet (as a back-office matter) cannot be the subject of any relevant SYA-level cash call either at Lloyd's or by Equitas Re; nor is the EquitasRe-reinsured SYA participant susceptible to Member-level contributions to the Central Fund if he is no longer a Member. Such matters are not the concern of any EquitasRe-assured-at-Lloyd's or any EquitasRe-reinsured SYA participant,⁶³ but that of the Lloyd's enterprise and of current (especially current corporate) Members, to the extent they wish to fund and make available⁶⁴ the New Central Fund, and thus enable the Lloyd's enterprise to honour its public blandishments of superior securitisation.

Part V: Miscellaneous

16. Equitas Re as agent-for-service of EquitasRe-reinsured SYA participants: *Amerada Hess*

The Article, p.9-10 mentions the *Amerada Hess v Rome* case. The Article's quotations from and characterisation of the judgment are multiply infelicitous. For example:-

(1) the Article, p.9 states: "The clear distinction between the Reinsurance Contract involving Equitas and the Names on the one hand and the underlying insurance contracts involving the Names and their policyholders on the other is further illustrated in *Amerada Hess v. CW Rome*." The case discusses no such distinction. Indeed, it does not consider any insurance

Price v Lloyd's [2000] Lloyd's Rep IR 453, 461 (Colman J); *McAllister v Lloyd's* [1999] Lloyd's Rep IR 487 (Carnwath J).

⁶² Cf. (for example) the "refusenik" EquitasRe-reinsured SYA participant who declined to enter into RRC 1.

⁶³ If a former Member, he is not susceptible to any meaningful or enforceable relevant regulation.

⁶⁴ See, at New Central Fund Byelaw (No. 23 of 1996), §8(4)(b) the purported discretion given to members of Lloyd's in Lloyd's general meeting to make available the New Central Fund to "directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member" (*ibid.*, §8(3)(b)).

contract at all. Rather, so far as relevant, it considers certain provisions in an unspecified⁶⁵ managing agency agreement, and unspecified provisions in RRC 4.

(2) the Article, p.9-10 quotes the judgment in this way: "[the claimants] embarked on a course — the attempt to effect service on the syndicates by serving Equitas — which a few minutes' investigation of the Equitas reinsurance contract would have shown to be completely hopeless." The Article's insertion of the word "claimants" appears to seek to give the impression that the judge held that the claimants' attempt to serve Equitas Re as a principal was completely hopeless, and that he found that RRC 4 says that such an attempt was completely hopeless. Contrary to the Article's representation, the judge did not use the words "the claimants". He used the words "Holmans had". Far from trying to sue Equitas Re personally, Holman Fenwick & Willan — the claimants' solicitors — were trying to serve Equitas Re merely as an agent of relevant EquitasRe-reinsured SYA participants in the absence of any more obvious agent-for-service.

On that point, the judge held that Equitas Re was not an automatic agent-for-notice. In doing so, the judge did not investigate all relevant provisions of either RRC 4 — indeed, both the judge and relevant lawyers appear to have confused Equitas Re's RRC 4, §3 reinsurance and *ibid.*, §9 run-off functions⁶⁶ — or any relevant managing agency agreement.⁶⁷ Had he done so, he would arguably have been led to conclude that one of Equitas Re's essential functions is to compulsorily (not discretionarily⁶⁸) receive service of process on behalf of EquitasRe-

⁶⁵ The judgment does not identify the "Managing Agent's Agreement". Only examination of *op. cit.*, §5(w) identifies it as SUA 1.

⁶⁶ See for example transcript, p.10: Colman J recounts (transcript, p.10) that the lawyer for one of the parties:-

points to the fact that, following Lloyd's Reconstruction and Renewal Settlement, Equitas was the reinsurer of all the Lloyd's syndicates in respect of 1992 and prior risks and that Equitas was in control of all defence matters relating to this claim and would, if approached, clearly have given authority to accept service.

And see *ibid.*, p.13:-

Mr McKenna telephoned ... an in-house legal adviser at Equitas Ltd. He took this course because he took the view that because Equitas had taken over the syndicates' risks by way of ... reinsurance under R&R, one possible solution to the problem of effecting service on the Lloyd's defendants would be to serve the writs on Equitas.

⁶⁷ See for example the agreements appended to Byelaws 1 of 1985 and 8 of 1988.

⁶⁸ The judge attributes to Equitas Re a mere discretion to accept service based on his construction of SUA 1, §5(w) as being a bare power: Transcript, p.18:-

[T]here can be no effective service on a managing agent unless it chooses in any particular case to exercise the power granted to it by the clause to accept service. ... [M]erely leaving the writ at the registered offices in question after business hours gave no opportunity to the agent to exercise that power

And see similarly, *ibid.*, p.19:-

What is the effect of clause 5 of the Managing Agents Agreement? The words of this clause are clearly designed to vest in the agent powers of a discretionary nature. They contrast with the words of clause 4 which set out the agent's duties. In other words it is up to the agent whether he chooses to exercise those powers as are necessary or expedient for the objects described in clause 5. Thus the agency is not under a duty to accept service of proceedings unless it decides to do so.

If that view (in which the judge appears to be addressing Equitas Re as RRC 4, §9 run-off agent) be correct, Equitas Re and a managing agency ordinarily at Lloyd's acting under that or a like form of agreement would be entitled not only to decline to accept service of any proceedings at will but to similarly pick and choose which other relevant functions to exercise, to decline to participate in a representation agreement with other managing agencies, and to compel a plaintiff to find some other servee, necessarily unempowered to deal with the proceedings, timeously or otherwise. In reality, §5 lists the managing agency's essential functions, not its bare powers. The judge appears to have misunderstood other issues. For example, at transcript, p.19, he says: "The plain representation contained in the Managing Agents Agreement is ... not to the effect that the agency has authority to accept service, but that it has authority to exercise a discretionary power to accept service." Since no actual or prospective assured-at-Lloyd's is informed of any agency agreement between any SYA participant and any managing agency (or indeed of any other rele-

reinsured SYA participants, especially in the current absence of any mechanism permitting service at, for example, One Lime Street (as the EquitasRe-reinsured SYA participant's last known place of business). Presumably no English court in possession of all the facts would deprive Equitas Re of the exercise to the fullest of its run-off agency role, *a fortiori* to the extent that Equitas Re insists that Lloyd's brokers broke claims on EquitasRe-reinsured insurance contracts solely to itself. Contentious business at Lloyd's as currently configured could not rationally be conducted on any other basis.⁶⁹

(3) the Article, p.10 states "*Amerada* makes clear that policyholders under English law have no direct cause of action against Equitas by reason of the Reinsurance Contract." That is an egregious mischaracterisation of both the judgment and the underlying dispute. Equitas Re's personal liability to the claimants was never in controversy. The judge did not consider it. The claimants did not plead or argue it. The case did address an application the claimants happened to make to amend their claim, but an allegation that Equitas Re was personally liable to them, even as a run-off agent, was not even one of their proposed amendments. The case, so far as relevant, concerned only Equitas Re as agent for service of process.⁷⁰

(4) the Article, footnote 69 asseverates: "The position advocated in *Amerada Hess* was affirmed as legally correct in *National Bank of Greece SA v. RM Outhwaite*, 16 January 2001 (Q.B.)." That statement is pernicious. The *National Bank of Greece* case⁷¹ does not mention *Amerada Hess*, and does not adjudicate the extent to which Equitas Re was or was not an agent-for-service.⁷² Irrationally dismissive⁷³ of Equitas Management Services Ltd. as an

vant back-office agreement or arrangement), query how there can be any "representation". Business at Lloyd's proceeds on the basis that, absent a service-of-suit clause, service cannot be and never is on any relevant SYA participant personally but solely on a person compulsorily exercising relevant agency functions. Ordinarily at Lloyd's, service of process in England on a representative SYA participant is on his managing agency, *whether or not* he is an external or working Member.

⁶⁹ For example: (1) it is futile to serve any EquitasRe-reinsured SYA participant personally — indeed, to serve *any* person other than the duly empowered agent — because he cannot conduct any procedural or substantive part of the litigation personally: see for example RRC 4, §9.4 ("It is expressly agreed that ERL and its delegates and sub-delegates will have irrevocable and exclusive power to manage each Run-off in accordance with the provisions of this Agreement and, subject to the provisions of the EATD, the ECTD and any Overseas Trust Deeds and to the fullest extent possible, shall manage each Run-off as if it were principal and, without prejudice to the generality of the foregoing, it is expressly agreed that: ... (b) in no circumstances will any Name or any Closed Year Name interfere with the exercise of the management or control of any Run-off") — an example of when notice to the principal is not notice to the principal; (2) it is futile to serve his pre-RRC 4 managing agency because the latter is no longer the managing agency of any EquitasRe-reinsured SYA stamp. Service on Equitas Re as each relevant EquitasRe-reinsured SYA participant's compulsory RRC 4, §9 run-off agent is no less unavoidable or consistent with established practice than service on a managing agency under SUA 1.

⁷⁰ See particularly transcript, p.13: the claimant's solicitor "took the view that because Equitas had taken over the syndicates' risks by way of ... reinsurance under R&R, one possible solution to the problem of effecting service on the Lloyd's defendants would be to serve the writs on Equitas." The judgment does not suggest that the claimant's solicitor took the view that because Equitas Re was a reinsurer, it was personally liable to the claimant.

⁷¹ Reported at [2001] Lloyd's Rep IR 652.

⁷² See especially *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 656 (Andrew Smith J). The closest that the case came to overlapping with *Amerada Hess* was: (1) in considering, in relation to Equitas Management Services Ltd., whether that company's address at the bottom of the claim form meant that, as far as concerned the EquitasRe-reinsured SYA participant defendants in that case, 'the Claim Form cannot be said to be one "to be served out of the jurisdiction" within the meaning of CPR, Rule 7.5'; (2) in the bald averment, at *ibid.*, 656, 657, by Equitas "companies" "stating that service of the form did not constitute effective service upon the relevant syndicates". That point was not in controversy in *National Bank of Greece* and was not the subject of any adjudication.

agent-for-service for EquitasRe-reinsured SYA participants, the judge appears to have adopted without consideration (and to some extent contradictorily⁷⁴) the bizarre and obviously erroneous contention⁷⁵ by the legal representative of "Equitas"⁷⁶ that service had to be effected on either each relevant EquitasRe-reinsured SYA participant individually or on a representative SYA participant personally. Indeed, the case is noteworthy for the judge's failure to adjudicate the point, and for the claimant's unnecessary and inappropriate attempt to serve one supposed relevant SYA participant personally out of the jurisdiction.

(5) the Article, p.9 states: "[t]he claimants delivered writs for service to Equitas instead of to the Lloyd's syndicates", "[t]he court held that service on Equitas would not effect service on the relevant reinsured Lloyd's syndicates", and "[t]he claimants argued that serving Equitas was effective service on the syndicates". These references to syndicates indicate misunderstanding. A syndicate properly so called is not a proper servee in any event, because it is incorporeal, has no members, participants or relevant representatives, and does not trade or conduct any activities.

17. The Article's purpose and conclusion

The Article's stated purpose, at *ibid.*, p.4-5, was "to demonstrate that the majority view of American courts is entirely consistent with general principles of English law, including cases that have considered the Equitas reinsurance arrangement." English law, especially the jurisprudence which has considered RRC 4, does not provide the support claimed. The Article therefore fails in its purpose. It also missed a fine opportunity to counter the myth, misunderstanding, mischaracterisation, half-truth, omission and terminological imprecision obstructing this essentially straightforward subject's accurate exposition, and to expound, for the benefit of "misguided"⁷⁷ US assured-side lawyers, how Equitas Re and its reinsurance functions actually bear — financially, substantively, procedurally and administratively — on their all too often ill-served clients. Instead, the Article appears to be an attempt to disseminate fresh misinformation.

The first book⁷⁸ ever written specifically on the Lloyd's enterprise was published in 1991. Since then, and notwithstanding epic litigation⁷⁹ and continuing material financial and legal

⁷³ *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657, §13. The judge gave no reason for considering that the point seemed to him "hopeless" (*ibid.*) His view that Equitas Management Services (which is not a run-off agent) was not agent-for-service is correct probably only by coincidence.

⁷⁴ See for example *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§9) and 663 (§47) (references to "Equitas" indeed representing the Outhwaite "syndicate").

⁷⁵ See *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§14). SYA participants appoint a managing agency to receive service on their collective behalfs. Any argument that Equitas Re is not the agent-for-service of every EquitasRe-reinsured SYA participant is wholly unsustainable: absent a service-of-suit clause mandating service on another party, what other agent-for-service do such SYA participants have? And see for example RRC 4, §10.3.

⁷⁶ See *National Bank of Greece v Outhwaite* [2001] Lloyd's Rep IR 652, 657 (§14).

⁷⁷ Article, p.1.

⁷⁸ Richard J. Astor, *Lloyd's Membership: A Guide to Law and Practice* (looseleaf).

⁷⁹ See the summary at Appendix 1 at *Lloyd's v Jaffray* {2a} [2000] CLC 725 (Cresswell J; appeal dismissed July 26, 2002). Relevant cases include (for example) *Lark v Outhwaite* [1991] LRLR 1; *Hiscox v Outhwaite* [1991] LRLR 93; *Boobyer v David Holman & Co Ltd. and Lloyd's* [1992] 2 Lloyd's Rep. 436; *Ashmore v Lloyd's* [1992] 2 Lloyd's Rep. 1; *Boobyer v David Holman & Co Ltd. and Lloyd's (No. 2)* [1993] 1 Lloyd's Rep. 96; *Napier & Ettrick v R. F. Kershaw Ltd.* [1993] 1 Lloyd's Rep. 10; *Ashmore v Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620; *R v Lloyd's ex parte Briggs* [1993] 1 Lloyd's Rep. 176; *Napier & Ettrick v Hunter* [1993] AC 713; *Lloyd's v Morris* [1993] LRLR 217; *Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep. 579; *Feltrim and Gooda Walker actions* [1994] LRLR 168 [1996] LRLR

contentiousness, the law and practice of Lloyd's has failed to evolve into either a scrupulous academic subject or a rigorous professional discipline, in England as elsewhere. It is particularly fashionable for the self-professedly expert Lloyd's-Equitas lawyer to contrive bogus financial models, and counsel cheap settlement at Equitas Re, or even (as the Article correctly points out) to pursue Equitas Re personally, because he has failed to familiarise himself with his client EquitasRe-assured's-at-Lloyd's continuing right to 100% indemnity at Lloyd's.⁸⁰ Such matters, and the endemic imprecision that continues to characterise the practice of this most recondite subject, will doubtless eventually be aired in the malpractice courts.

135; *The Merrrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 193; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1995] 2 Lloyd's Rep. 197; *The Merrett, Gooda Walker and Feltrim Cases* [1994] 2 Lloyd's Rep. 468; *Sword-Daniels v Pitel*; *Brown v KMR Services Ltd.* [1994] LRLR 10; *Arbuthnott v Fagan* [1996] LRLR 143; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1995] LRLR 20; *The Merrett, Feltrim and Gooda Walker Cases* [1995] 2 AC 145; *Deeny v Gooda Walker Ltd.* [1996] LRLR 183; *Lloyd's v Clementson* [1995] LRLR 307; *Deeny v Gooda Walker* [1995] STC 439; *Cox v Bankside Members' Agency Ltd.* [1995] 2 Lloyd's Rep. 437; *Aikens v Stewart Wrightson Members Agency Ltd.* [1995] 2 Lloyd's Rep. 618; *Deeny v Gooda Walker Ltd.* [1995] LRLR 117; [1996] LRLR 176; *Caudle v Sharp* [1995] LRLR 389; *Sheldon v R.H.M. Outhwaite (Underwriting Agencies) Ltd.* [1996] 1 AC 102; *Cox v Bankside Members Agency Ltd.* [1995] 2 Lloyd's Rep. 437; *Deeny v Gooda Walker Ltd (No. 3)* [1996] LRLR 168; *Brown v KMR Services Ltd.* [1995] LRLR 241; *PCW Syndicates v PCW Reinsurers* [1995] LRLR 373; *Cox v Deeny* [1996] LRLR 288; *Deeny v Gooda Walker Ltd.* [1995] LRLR 361; [1996] LRLR 109; *Marchant & Elliott Underwriting Ltd. v Higgins* [1996] 1 Lloyd's Rep. 313; *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 265; *Deeny v Walker* [1996] LRLR 276; *Marchant & Elliott Underwriting Ltd. v Higgins* [1996] 2 Lloyd's Rep. 31; *Arbuthnott v Feltrim Underwriting Agencies Ltd.* [1996] CLC 714; *Henderson v Merrett Syndicates Ltd.* [1997] LRLR 247; *Deeny v Gooda Walker Ltd.* [1996] LRLR 109; *Berriman v Rose Thomson Young (Underwriting) Ltd.* [1996] LRLR 426; *Judd v Merrett* [1997] LRLR 21; *Lloyd's v Clementson* [1997] LRLR 175; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; *Axa Reinsurance (UK) Plc v Field* [1996] 2 Lloyd's Rep. 233; *Hill v The Mercantile & General Reinsurance Co Plc* [1996] LRLR 341.

⁸⁰ At a bare minimum, the assured-side lawyer must be intimately familiar with relevant legal instruments, which tend to include (for example) Lloyd's US Surplus-Lines Common-Use Trust Deed; Lloyd's US Credit-for-Reinsurance Common-Use Trust Deed, Lloyd's American Trust Deed, and other recourse-fund instruments. On the considerable complexity of Equitas Re's financial affairs in (for example) New York, see incidentally (for example): (1) DTI's authorisation letter to Equitas Re and Equitas Ltd., September 3, 1996; (2) Superintendent Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF, September 3, 1996; (3) Superintendent Muhl letter to David Rowland (Lloyd's) and Peter Von Kaufmann (Citibank) approving transfer of assets from LATFs to EATF subject to conditions, September 3, 1996; (4) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re annual list of underwriting members, August 30, 1996; (5) David Westby (Lloyd's) to Vinnie Laurenzano (NYID) re relevant documentation, August 30, 1996; (6) Jonathan Spencer (DTI) to Laurenzano (NYID) re Equitas reporting, September 3, 1996; (7) Jane Barker (Equitas) to Laurenzano (NYID) re notice and examination in event of proportionate cover, September 3, 1996; (8) Westby (Lloyd's) to Laurenzano (NYID) with attached September 3, 1996 letter from Jeffrey Mace (LeBoeuf) to Laurenzano (NYID) re managing agencies compliance with byelaws, August 30, 1996; (9) Jeremy Heap (Equitas) to Laurenzano (NYID) re Equitas premiums and reserves, August 30, 1996; (10) Martin Brebner (DTI) to Laurenzano (NYID) re amount of US dollar liabilities, August 30, 1996; (11) N.A. Jones (Citibank) to Laurenzano (NYID) re transfer to LATFs from Central Fund, August 30, 1996; (12) Jane Barker (Equitas) to Laurenzano (NYID) re top-up, August 30, 1996; (13) Agreement between Equitas Ltd. and NYID, September 3, 1996; (14) Collateral Agreement between Equitas Ltd. and NYID, September 3, 1996; (15) Agreement amending September 3, 1996 Collateral Agreement between Equitas Ltd. and NYID (undated?); (16) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, September 4, 1996; (17) Custody Agreement relating to Charged Accounts between Bankers Trust Company, Equitas Ltd. and NYID, October 1996; (18) Memorandum of Waiver between Equitas Ltd. and NYID, September 3, 1996; (19) UCC-1 Financing Statement between Equitas Ltd. (debtor) and NYID (secured party) (undated?); (20) Assignment Agreement Financial Reinsurances AUA 9, the Relevant Names, Lloyd's, AUA 10, Equitas Re, September 4, 1996; (21) Assignment Agreement between Equitas Ltd., and Citibank, September 4, 1996.

APPENDIX II: LEGISLATION

Companies Act 1985, ss.425, 426, 427, 735, 735A, 735B 736	A25
Financial Services and Markets Act 2000, ss.314-324, 355-379, 424	A28
Financial Services And Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001	A42
Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001	A44
Lloyd's Act 1871, recitals; ss.1, 2, 3, 40	A45
Lloyd's Act 1911, recitals; ss.1-4, 7, 9	A47
Lloyd's Act 1951, recitals; ss.1, 3, 5	A49
Lloyd's Act 1982, recitals; ss.1, 2, 6, 8, 9, 13, 14; Sch. 1	A50
Reorganisation Directive	A55

Companies Act 1985, ss.425, 426, 427, 735, 735A, 735B 736

...

Part XIII Arrangements and Reconstructions

425 — Power of company to compromise with creditors and members

- (1) Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, or an administration order being in force in relation to a company, of the liquidator or administrator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be summoned in such manner as the court directs.
- (2) If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all creditors or the class of creditors or on the members or class of members, (as the case may be), and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.
- (3) The court's order under subsection (2) has no effect until an office copy of it has been delivered to the registrar of companies for registration; and a copy of every such order shall be annexed to every copy of the company's memorandum issued after the order has been made or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting the company or defining its constitution.
- (4) If a company makes default in complying with subsection (3), the company and every officer of it who is in default is liable to a fine.
- (5) An order under subsection (1) pronounced in Scotland by the judge acting as vacation judge in pursuance of section 4 of the Administration of Justice (Scotland) Act 1933 is not subject to review, reduction, suspension or stay of execution.
- (6) In this section and the next —
 - (a) "company" means any company liable to be wound up under this Act, and
 - (b) "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

426 — Information as to compromise to be circulated

- (1) The following applies where a meeting of creditors or any class of creditors, or of members or any class of members, is summoned under section 425.
- (2) With every notice summoning the meeting which is sent to a creditor or member there shall be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company (whether as directors or as members or as creditors of the company or otherwise) and the effect on those interests of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons.
- (3) In every notice summoning the meeting which is given by advertisement there shall be included either such a statement as above-mentioned or a notification of the place at which, and the manner in which, creditors or members entitled to attend the meeting may obtain copies of the statement.
- (4) Where the compromise or arrangement affects the rights of debenture holders of the company, the statement shall give the like explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the company's directors.

- (5) Where a notice given by advertisement includes a notification that copies of a statement explaining the effect of the compromise or arrangement proposed can be obtained by creditors or members entitled to attend the meeting, every such creditor or member shall, on making application in the manner indicated by the notice, be furnished by the company free of charge with a copy of the statement.
- (6) If a company makes default in complying with any requirement of this section, the company and every officer of it who is in default is liable to a fine; and for this purpose a liquidator [or administrator] of the company and a trustee of a deed for securing the issue of debentures of the company is deemed an officer of it.

However, a person is not liable under this subsection if he shows that the default was due to the refusal of another person, being a director or trustee for debenture holders, to supply the necessary particulars of his interests.
- (7) It is the duty of any director of the company, and of any trustee for its debenture holders, to give notice to the company of such matters relating to himself as may be necessary for purposes of this section; and any person who makes default in complying with this subsection is liable to a fine.

427 — Provisions for facilitating company reconstruction or amalgamation

- (1) The following applies where application is made to the court under section 425 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section.
- (2) If it is shown
 - (a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies, and
 - (b) that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme ("a transferor company") is to be transferred to another company ("the transferee company"),

the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters.
- (3) The matters for which the court's order may make provision are
 - (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company,
 - (b) the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person,
 - (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company,
 - (d) the dissolution, without winding up, of any transferor company,
 - (e) the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement,
 - (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.
- (4) If an order under this section provides for the transfer of property or liabilities, then
 - (a) that property is by virtue of the order transferred to, and vests in, the transferee company, and
 - (b) those liabilities are, by virtue of the order, transferred to and become liabilities of that company;

and property (if the order so directs) vests freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

- (5) Where an order is made under this section, every company in relation to which the order is made shall cause an office copy of the order to be delivered to the registrar of companies for registration within 7 days after its making; and if default is made in complying with this subsection, the company and every officer of it who is in default is liable to a fine and, for continued contravention, to a daily default fine.
- (6) In this section the expression "property" includes property, rights and powers of every description; the expression "liabilities" includes duties and "company" includes only a company as defined in section 735(1).

...

735 — "Company". etc

- (1) In this Act —
 - (a) "company" means a company formed and registered under this Act, or an existing company;
 - (b) "existing company" means a company formed and registered under the former Companies Acts, but does not include a company registered under the Joint Stock Companies Acts, the Companies Act 1862 or the Companies (Consolidation) Act 1908 in what was then Ireland;
 - (c) "the former Companies Acts" means the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983.
- (2) "Public company and private company" have the meanings given by section 1(3).
- (3) "The Joint Stock Companies Acts" means the Joint Stock Companies Act 1856, the Joint Stock Companies Acts 1856, 1857, the Joint Stock Banking Companies Act 1857 and the Act to enable Joint Stock Banking Companies to be formed on the principle of limited liability, or any one or more of those Acts (as the case may require), but does not include the Joint Stock Companies Act 1844.
- (4) The definitions in this section apply unless the contrary intention appears.

735A — Relationship of this Act to Insolvency Act

- (1) In this Act "the Insolvency Act" means the Insolvency Act 1986; and in the following provisions of this Act, namely, sections 375(1)(b), 425(6)(a), 460(2), 675, 676, 677, 699(1), 728 and Schedule 21, paragraph 6(1), the words "this Act" are to be read as including Parts I to VII of that Act, sections 411, 413, 414, 416 and 417 in Part XV of that Act, and also the Company Directors Disqualification Act 1986.
- (2) In sections 704(5), (7) and (8), 706(1), 707(1), 707A(1)j 708(1)(a) and (4), 709(1) and (3)j 710A, 713(1), 729 and 732(3) references to the Companies Acts include Parts I to VII of the Insolvency Act, sections 411, 413, 414, 416 and 417 in Part XV of that Act, and also the Company Directors Disqualification Act 1986.
- (3) Subsections (1) and (2) apply unless the contrary intention appears.

735B — Relationship of this Act to Parts IV and V of the Financial Services Act 1986

In sections 704(5), (7) and (8), 706(1), 707(1), 707A(1), 7080)(a) and (4), 7090) and (3), 710A and 713(1) references to the Companies Acts include Parts IV and V of the Financial Services Act 1986.

736 — "Subsidiary", "holding company" and "wholly-owned subsidiary"

- (1) A company is a "subsidiary" of another company, its "holding company", if that other company
 - (a) holds a majority of the voting rights in it, or
 - (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
 - (c) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it,

or if it is a subsidiary of a company which is itself a subsidiary of that other company.

- (2) A company is a "wholly-owned subsidiary" of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.
- (3) In this section "company" includes any body corporate.
- ...

Financial Services and Markets Act 2000, ss.314-324, 355-379, 424

PART XIX

LLOYD'S

General

314 — Authority's general duty

- (1) The Authority must keep itself informed about-
 - (a) the way in which the Council supervises and regulates the market at Lloyd's; and
 - (b) the way in which regulated activities are being carried on in that market.
- (2) The Authority must keep under review the desirability of exercising-
 - (a) any of its powers under this Part;
 - (b) any powers which it has in relation to the Society as a result of section 315.

The Society

315 – The Society: authorisation and permission

- (1) The Society is an authorised person.
- (2) The Society has permission to carry on a regulated activity of any of the following kinds-
 - (a) arranging deals in contracts of insurance written at Lloyd's ("the basic market activity");
 - (b) arranging deals in participation in Lloyd's syndicates ("the secondary market activity"); and
 - (c) an activity carried on in connection with, or for the purposes of, the basic or secondary market activity.
- (3) For the purposes of Part IV, the Society's permission is to be treated as if it had been given on an application for permission under that Part.
- (4) The power conferred on the Authority by section 45 may be exercised in anticipation of the coming into force of the Society's permission (or at any other time).
- (5) The Society is not subject to any requirement of this Act concerning the registered office of a body corporate.

Power to apply Act to Lloyd's underwriting

316 – Direction by Authority

- (1) The general prohibition or (if the general prohibition is not applied under this section) a core provision applies to the carrying on of an insurance market activity by-
 - (a) a member of the Society, or

- (b) the members of the Society taken together,
only if the Authority so directs.
- (2) A direction given under subsection (1) which applies a core provision is referred to in this Part as "an insurance market direction".
- (3) In subsection (1) -
"core provision" means a provision of this Act mentioned in section 317; and
"insurance market activity" means a regulated activity relating to contracts of insurance written at Lloyd's.
- (4) In deciding whether to give a direction under subsection (1), the Authority must have particular regard to-
 - (a) the interests of policyholders and potential policyholders;
 - (b) any failure by the Society to satisfy an obligation to which it is subject as a result of a provision of the law of another EEA State which-
 - (i) gives effect to any of the insurance directives; and
 - (ii) is applicable to an activity carried on in that State by a person to whom this section applies;
 - (c) the need to ensure the effective exercise of the functions which the Authority has in relation to the Society as a result of section 315.
- (5) A direction under subsection (1) must be in writing.
- (6) A direction under subsection (1) applying the general prohibition may apply it in relation to different classes of person.
- (7) An insurance market direction-
 - (a) must specify each core provision, class of person and kind of activity to which it applies;
 - (b) may apply different provisions in relation to different classes of person and different kinds of activity.
- (8) A direction under subsection (1) has effect from the date specified in it, which may not be earlier than the date on which it is made.
- (9) A direction under subsection (1) must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public.
- (10) The Authority may charge a reasonable fee for providing a person with a copy of the direction.
- (11) The Authority must, without delay, give the Treasury a copy of any direction which it gives under this section.

317 – The core provisions

- (1) The core provisions are Parts V, X, XI, XII, XIV, XV, XVI, XXII and XXIV, sections 384 to 386 and Part XXVI.
- (2) References in an applied core provision to an authorised person are (where necessary) to be read as references to a person in the class to which the insurance market direction applies.
- (3) An insurance market direction may provide that a core provision is to have effect, in relation to persons to whom the provision is applied by the direction, with modifications.

318 – Exercise of powers through Council

- (1) The Authority may give a direction under this subsection to the Council or to the Society (acting through the Council) or to both.
- (2) A direction under subsection (1) is one given to the body concerned -
 - (a) in relation to the exercise of its powers generally with a view to achieving, or in support of, a specified objective; or

- (b) in relation to the exercise of a specified power which it has, whether in a specified manner or with a view to achieving, or in support of, a specified objective.
- (3) "Specified" means specified in the direction.
- (4) A direction under subsection (1) may be given-
 - (a) instead of giving a direction under section 316(1); or
 - (b) if the Authority considers it necessary or expedient to do so, at the same time as, or following, the giving of such a direction.
- (5) A direction may also be given under subsection (1) in respect of underwriting agents as if they were among the persons mentioned in section 316(1).
- (6) A direction under this section -
 - (a) does not, at any time, prevent the exercise by the Authority of any of its powers;
 - (b) must be in writing.
- (7) A direction under subsection (1) must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public.
- (8) The Authority may charge a reasonable fee for providing a person with a copy of the direction.
- (9) The Authority must, without delay, give the Treasury a copy of any direction which it gives under this section.

319 – Consultation

- (1) Before giving a direction under section 316 or 318, the Authority must publish a draft of the proposed direction.
- (2) The draft must be accompanied by-
 - (a) a cost benefit analysis; and
 - (b) notice that representations about the proposed direction may be made to the Authority within a specified time.
- (3) Before giving the proposed direction, the Authority must have regard to any representations made to it in accordance with subsection (2)(b).
- (4) If the Authority gives the proposed direction it must publish an account, in general terms, of-
 - (a) the representations made to it in accordance with subsection (2)(b); and
 - (b) its response to them.
- (5) If the direction differs from the draft published under subsection (1) in a way which is, in the opinion of the Authority, significant-
 - (a) the Authority must (in addition to complying with subsection (4)) publish details of the difference; and
 - (b) those details must be accompanied by a cost benefit analysis.
- (6) Subsections (1) to (5) do not apply if the Authority considers that the delay involved in complying with them would be prejudicial to the interests of consumers.
- (7) Neither subsection (2)(a) nor subsection (5)(b) applies if the Authority considers-
 - (a) that, making the appropriate comparison, there will be no increase in costs; or
 - (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance.
- (8) The Authority may charge a reasonable fee for providing a person with a copy of a draft published under subsection (1).
- (9) When the Authority is required to publish a document under this section it must do so in the way appearing to it to be best calculated to bring it to the attention of the public.

- (10) "Cost benefit analysis" means an estimate of the costs together with an analysis of the benefits that will arise-
 - (a) if the proposed direction is given; or
 - (b) if subsection (5)(b) applies, from the direction that has been given.
- (11) "The appropriate comparison" means-
 - (a) in relation to subsection (2)(a), a comparison between the overall position if the direction is given and the overall position if it is not given;
 - (b) in relation to subsection (5)(b), a comparison between the overall position after the giving of the direction and the overall position before it was given.

Former underwriting members

320 – Former underwriting members

- (1) A former underwriting member may carry out each contract of insurance that he has underwritten at Lloyd's whether or not he is an authorised person.
- (2) If he is an authorised person, any Part IV permission that he has does not extend to his activities in carrying out any of those contracts.
- (3) The Authority may impose on a former underwriting member such requirements as appear to it to be appropriate for the purpose of protecting policyholders against the risk that he may not be able to meet his liabilities.
- (4) A person on whom a requirement is imposed may refer the matter to the Tribunal.

321 – Requirements imposed under section 320

- (1) A requirement imposed under section 320 takes effect-
 - (a) immediately, if the notice given under subsection (2) states that that is the case;
 - (b) in any other case, on such date as may be specified in that notice.
- (2) If the Authority proposes to impose a requirement on a former underwriting member ("A") under section 320, or imposes such a requirement on him which takes effect immediately, it must give him written notice.
- (3) The notice must-
 - (a) give details of the requirement;
 - (b) state the Authority's reasons for imposing it;
 - (c) inform A that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal);
 - (d) inform him of the date on which the requirement took effect or will take effect; and
 - (e) inform him of his right to refer the matter to the Tribunal.
- (4) The Authority may extend the period allowed under the notice for making representations.
- (5) If, having considered any representations made by A, the Authority decides-
 - (a) to impose the proposed requirement, or
 - (b) if it has been imposed, not to revoke it,
 it must give him written notice.
- (6) If the Authority decides-
 - (a) not to impose a proposed requirement, or
 - (b) to revoke a requirement that has been imposed,
 it must give A written notice.

- (7) If the Authority decides to grant an application by A for the variation or revocation of a requirement, it must give him written notice of its decision.
- (8) If the Authority proposes to refuse an application by A for the variation or revocation of a requirement it must give him a warning notice.
- (9) If the Authority, having considered any representations made in response to the warning notice, decides to refuse the application, it must give A a decision notice.
- (10) A notice given under-
 - (a) subsection (5), or
 - (b) subsection (9) in the case of a decision to refuse the application,
 must inform A of his right to refer the matter to the Tribunal.
- (11) If the Authority decides to refuse an application for a variation or revocation of the requirement, the applicant may refer the matter to the Tribunal.
- (12) If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference.

322 – Rules applicable to former underwriting members

- (1) The Authority may make rules imposing such requirements on persons to whom the rules apply as appear to it to be appropriate for protecting policyholders against the risk that those persons may not be able to meet their liabilities.
- (2) The rules may apply to-
 - (a) former underwriting members generally; or
 - (b) to a class of former underwriting member specified in them.
- (3) Section 319 applies to the making of proposed rules under this section as it applies to the giving of a proposed direction under section 316.
- (4) Part X (except sections 152 to 154) does not apply to rules made under this section.

Transfers of business done at Lloyd's

323– Transfer schemes

The Treasury may by order provide for the application of any provision of Part VII (with or without modification) in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society or former underwriting members.

Supplemental

324 – Interpretation of this Part

- (1) In this Part -

"arranging deals", in relation to the investments to which this Part applies, has the same meaning as in paragraph 3 of Schedule 2;

"former underwriting member" means a person ceasing to be an underwriting member of the Society on, or at any time after, 24 December 1996; and

"participation in Lloyd's syndicates", in relation to the secondary market activity, means the investment described in sub-paragraph (1) of paragraph 21 of Schedule 2.
- (2) A term used in this Part which is defined in Lloyd's Act 1982 has the same meaning as in that Act.

...

PART XXIV
INSOLVENCY
Interpretation

355 – Interpretation of this Part

- (1) In this Part-
 - "the 1985 Act" means the Bankruptcy (Scotland) Act 1985;
 - "the 1986 Act" means the Insolvency Act 1986;
 - "the 1989 Order" means the Insolvency (Northern Ireland) Order 1989;
 - "body" means a body of persons-
 - (a) over which the court has jurisdiction under any provision of, or made under, the 1986 Act (or the 1989 Order); but
 - (b) which is not a building society, a friendly society or an industrial and provident society; and
 - "court" means-
 - (a) the court having jurisdiction for the purposes of the 1985 Act or the 1986 Act; or
 - (b) in Northern Ireland, the High Court.
- (2) In this Part "insurer" has such meaning as may be specified in an order made by the Treasury.

Voluntary arrangements

356 – Authority's powers to participate in proceedings: company voluntary arrangements

- (1) This section applies if a voluntary arrangement has been approved under Part I of the 1986 Act (or Part II of the 1989 Order) in respect of a company or insolvent partnership which is an authorised person.
- (2) The Authority may make an application to the court in relation to the company or insolvent partnership under section 6 of the 1986 Act (or Article 19 of the 1989 Order).
- (3) If a person other than the Authority makes an application to the court in relation to the company or insolvent partnership under either of those provisions, the Authority is entitled to be heard at any hearing relating to the application.

357 – Authority's powers to participate in proceedings: individual voluntary arrangements

- (1) The Authority is entitled to be heard on an application by an individual who is an authorised person under section 253 of the 1986 Act (or Article 227 of the 1989 Order).
- (2) Subsections (3) to (6) apply if such an order is made on the application of such a person.
- (3) A person appointed for the purpose by the Authority is entitled to attend any meeting of creditors of the debtor summoned under section 257 of the 1986 Act (or Article 231 of the 1989 Order).
- (4) Notice of the result of a meeting so summoned is to be given to the Authority by the chairman of the meeting.
- (5) The Authority may apply to the court-
 - (a) under section 262 of the 1986 Act (or Article 236 of the 1989 Order); or
 - (b) under section 263 of the 1986 Act (or Article 237 of the 1989 Order).
- (6) If a person other than the Authority makes an application to the court under any provision mentioned in subsection (5), the Authority is entitled to be heard at any hearing relating to the application.

...

*Administration orders***359 – Petitions**

- (1) The Authority may present a petition to the court under section 9 of the 1986 Act (or Article 22 of the 1989 Order) in relation to a company or insolvent partnership which-
 - (a) is, or has been, an authorised person;
 - (b) is, or has been, an appointed representative; or
 - (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (2) Subsection (3) applies in relation to a petition presented by the Authority by virtue of this section.
- (3) If the company or partnership is in default on an obligation to pay a sum due and payable under an agreement, it is to be treated for the purpose of section 8(1)(a) of the 1986 Act (or Article 21(1)(a) of the 1989 Order) as unable to pay its debts.
- (4) "Agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the company or partnership.
- (5) "Company" means-
 - (a) a company to which section 8 of the 1986 Act applies; or
 - (b) in relation to Northern Ireland, a company to which Article 21 of the 1989 Order applies.

360 – Insurers

- (1) The Treasury may by order provide that such provisions of Part II of the 1986 Act (or Part III of the 1989 Order) as may be specified are to apply in relation to insurers with such modifications as may be specified.
- (2) An order under this section-
 - (a) may provide that such provisions of this Part as may be specified are to apply in relation to the administration of insurers in accordance with the order with such modifications as may be specified; and
 - (b) requires the consent of the Secretary of State.
- (3) "Specified" means specified in the order.

361 – Administrator's duty to report to Authority

- (1) If-
 - (a) an administration order is in force in relation to a company or partnership by virtue of a petition presented by a person other than the Authority, and
 - (b) it appears to the administrator that the company or partnership is carrying on, or has carried on, a regulated activity in contravention of the general prohibition,
 the administrator must report the matter to the Authority without delay.
- (2) "An administration order" means an administration order under Part II of the 1986 Act (or Part III of the 1989 Order).

362 – Authority's powers to participate in proceedings

- (1) This section applies if a person other than the Authority presents a petition to the court under section 9 of the 1986 Act (or Article 22 of the 1989 Order) in relation to a company or partnership which-
 - (a) is, or has been, an authorised person;
 - (b) is, or has been, an appointed representative; or
 - (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.

- (2) The Authority is entitled to be heard-
 - (a) at the hearing of the petition; and
 - (b) at any other hearing of the court in relation to the company or partnership under Part II of the 1986 Act (or Part III of the 1989 Order).
- (3) Any notice or other document required to be sent to a creditor of the company or partnership must also be sent to the Authority.
- (4) The Authority may apply to the court under section 27 of the 1986 Act (or Article 39 of the 1989 Order); and on such an application, section 27(1)(a) (or Article 39(1)(a)) has effect with the omission of the words "(including at least himself)".
- (5) A person appointed for the purpose by the Authority is entitled-
 - (a) to attend any meeting of creditors of the company or partnership summoned under any enactment;
 - (b) to attend any meeting of a committee established under section 26 of the 1986 Act (or Article 38 of the 1989 Order); and
 - (c) to make representations as to any matter for decision at such a meeting.
- (6) If, during the course of the administration of a company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court under section 425 of the Companies Act 1985 (or Article 418 of the Companies (Northern Ireland) Order 1986).

Receivership

363 – Authority's powers to participate in proceedings

- (1) This section applies if a receiver has been appointed in relation to a company which-
 - (a) is, or has been, an authorised person;
 - (b) is, or has been, an appointed representative; or
 - (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (2) The Authority is entitled to be heard on an application made under section 35 or 63 of the 1986 Act (or Article 45 of the 1989 Order).
- (3) The Authority is entitled to make an application under section 41(1)(a) or 69(1)(a) of the 1986 Act (or Article 51(1)(a) of the 1989 Order).
- (4) A report under section 48(1) or 67(1) of the 1986 Act (or Article 58(1) of the 1989 Order) must be sent by the person making it to the Authority.
- (5) A person appointed for the purpose by the Authority is entitled-
 - (a) to attend any meeting of creditors of the company summoned under any enactment;
 - (b) to attend any meeting of a committee established under section 49 or 68 of the 1986 Act (or Article 59 of the 1989 Order); and
 - (c) to make representations as to any matter for decision at such a meeting.

364 – Receiver's duty to report to Authority

If-

- (a) a receiver has been appointed in relation to a company, and
- (b) it appears to the receiver that the company is carrying on, or has carried on, a regulated activity in contravention of the general prohibition,

the receiver must report the matter to the Authority without delay.

*Voluntary winding up***365 – Authority's powers to participate in proceedings**

- (1) This section applies in relation to a company which-
 - (a) is being wound up voluntarily;
 - (b) is an authorised person; and
 - (c) is not an insurer effecting or carrying out contracts of long-term insurance.
- (2) The Authority may apply to the court under section 112 of the 1986 Act (or Article 98 of the 1989 Order) in respect of the company.
- (3) The Authority is entitled to be heard at any hearing of the court in relation to the voluntary winding up of the company.
- (4) Any notice or other document required to be sent to a creditor of the company must also be sent to the Authority.
- (5) A person appointed for the purpose by the Authority is entitled-
 - (a) to attend any meeting of creditors of the company summoned under any enactment;
 - (b) to attend any meeting of a committee established under section 101 of the 1986 Act (or Article 87 of the 1989 Order); and
 - (c) to make representations as to any matter for decision at such a meeting.
- (6) The voluntary winding up of the company does not bar the right of the Authority to have it wound up by the court.
- (7) If, during the course of the winding up of the company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court under section 425 of the Companies Act 1985 (or Article 418 of the Companies (Northern Ireland) Order 1986).

366 – Insurers effecting or carrying out long-term contracts or insurance

- (1) An insurer effecting or carrying out contracts of long-term insurance may not be wound up voluntarily without the consent of the Authority.
- (2) If notice of a general meeting of such an insurer is given, specifying the intention to propose a resolution for voluntary winding up of the insurer, a director of the insurer must notify the Authority as soon as practicable after he becomes aware of it.
- (3) A person who fails to comply with subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (4) The following provisions do not apply in relation to a winding-up resolution-
 - (a) sections 378(3) and 381A of the Companies Act 1985 ("the 1985 Act"); and
 - (b) Articles 386(3) and 389A of the Companies (Northern Ireland) Order 1986 ("the 1986 Order").
- (5) A copy of a winding-up resolution forwarded to the registrar of companies in accordance with section 380 of the 1985 Act (or Article 388 of the 1986 Order) must be accompanied by a certificate issued by the Authority stating that it consents to the voluntary winding up of the insurer.
- (6) If subsection (5) is complied with, the voluntary winding up is to be treated as having commenced at the time the resolution was passed.
- (7) If subsection (5) is not complied with, the resolution has no effect.
- (8) "Winding-up resolution" means a resolution for voluntary winding up of an insurer effecting or carrying out contracts of long-term insurance.

*Winding up by the court***367 – Winding-up petitions**

- (1) The Authority may present a petition to the court for the winding up of a body which-
 - (a) is, or has been, an authorised person;
 - (b) is, or has been, an appointed representative; or
 - (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (2) In subsection (1) "body" includes any partnership.
- (3) On such a petition, the court may wind up the body if-
 - (a) the body is unable to pay its debts within the meaning of section 123 or 221 of the 1986 Act (or Article 103 or 185 of the 1989 Order); or
 - (b) the court is of the opinion that it is just and equitable that it should be wound up.
- (4) If a body is in default on an obligation to pay a sum due and payable under an agreement, it is to be treated for the purpose of subsection (3)(a) as unable to pay its debts.
- (5) "Agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the body concerned.
- (6) Subsection (7) applies if a petition is presented under subsection (1) for the winding up of a partnership-
 - (a) on the ground mentioned in subsection (3)(b); or
 - (b) in Scotland, on a ground mentioned in subsection (3)(a) or (b).
- (7) The court has jurisdiction, and the 1986 Act (or the 1989 Order) has effect, as if the partnership were an unregistered company as defined by section 220 of that Act (or Article 184 of that Order).

368 – Winding-up petitions: EEA and Treaty firms

The Authority may not present a petition to the court under section 367 for the winding up of-

- (a) an EEA firm which qualifies for authorisation under Schedule 3, or
- (b) a Treaty firm which qualifies for authorisation under Schedule 4,

unless it has been asked to do so by the home state regulator of the firm concerned.

369 – Insurers: service of petition etc. on Authority

- (1) If a person other than the Authority presents a petition for the winding up of an authorised person with permission to effect or carry out contracts of insurance, the petitioner must serve a copy of the petition on the Authority.
- (2) If a person other than the Authority applies to have a provisional liquidator appointed under section 135 of the 1986 Act (or Article 115 of the 1989 Order) in respect of an authorised person with permission to effect or carry out contracts of insurance, the applicant must serve a copy of the application on the Authority.

370 – Liquidator's duty to report to Authority

If-

- (a) a company is being wound up voluntarily or a body is being wound up on a petition presented by a person other than the Authority, and
- (b) it appears to the liquidator that the company or body is carrying on, or has carried on, a regulated activity in contravention of the general prohibition,

the liquidator must report the matter to the Authority without delay.

371 – Authority's powers to participate in proceedings

- (1) This section applies if a person other than the Authority presents a petition for the winding up of a body which-

- (a) is, or has been, an authorised person;
 - (b) is, or has been, an appointed representative; or
 - (c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (2) The Authority is entitled to be heard-
- (a) at the hearing of the petition; and
 - (b) at any other hearing of the court in relation to the body under or by virtue of Part IV or V of the 1986 Act (or Part V or VI of the 1989 Order).
- (3) Any notice or other document required to be sent to a creditor of the body must also be sent to the Authority.
- (4) A person appointed for the purpose by the Authority is entitled-
- (a) to attend any meeting of creditors of the body;
 - (b) to attend any meeting of a committee established for the purposes of Part IV or V of the 1986 Act under section 101 of that Act or under section 141 or 142 of that Act;
 - (c) to attend any meeting of a committee established for the purposes of Part V or VI of the 1989 Order under Article 87 of that Order or under Article 120 of that Order; and
 - (d) to make representations as to any matter for decision at such a meeting.
- (5) If, during the course of the winding up of a company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court under section 425 of the Companies Act 1985 (or Article 418 of the Companies (Northern Ireland) Order 1986).

Bankruptcy

372 – Petitions

- (1) The Authority may present a petition to the court-
- (a) under section 264 of the 1986 Act (or Article 238 of the 1989 Order) for a bankruptcy order to be made against an individual; or
 - (b) under section 5 of the 1985 Act for the sequestration of the estate of an individual.
- (2) But such a petition may be presented only on the ground that-
- (a) the individual appears to be unable to pay a regulated activity debt; or
 - (b) the individual appears to have no reasonable prospect of being able to pay a regulated activity debt.
- (3) An individual appears to be unable to pay a regulated activity debt if he is in default on an obligation to pay a sum due and payable under an agreement.
- (4) An individual appears to have no reasonable prospect of being able to pay a regulated activity debt if-
- (a) the Authority has served on him a demand requiring him to establish to the satisfaction of the Authority that there is a reasonable prospect that he will be able to pay a sum payable under an agreement when it falls due;
 - (b) at least three weeks have elapsed since the demand was served; and
 - (c) the demand has been neither complied with nor set aside in accordance with rules.
- (5) A demand made under subsection (4)(a) is to be treated for the purposes of the 1986 Act (or the 1989 Order) as if it were a statutory demand under section 268 of that Act (or Article 242 of that Order).
- (6) For the purposes of a petition presented in accordance with subsection (1)(b)-
- (a) the Authority is to be treated as a qualified creditor; and

- (b) a ground mentioned in subsection (2) constitutes apparent insolvency.
- (7) "Individual" means an individual-
 - (a) who is, or has been, an authorised person; or
 - (b) who is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (8) "Agreement" means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the individual concerned.
- (9) "Rules" means-
 - (a) in England and Wales, rules made under section 412 of the 1986 Act;
 - (b) in Scotland, rules made by order by the Treasury, after consultation with the Scottish Ministers, for the purposes of this section; and
 - (c) in Northern Ireland, rules made under Article 359 of the 1989 Order.

373 – Insolvency practitioner's duty to report to Authority

- (1) If-
 - (a) a bankruptcy order or sequestration award is in force in relation to an individual by virtue of a petition presented by a person other than the Authority, and
 - (b) it appears to the insolvency practitioner that the individual is carrying on, or has carried on, a regulated activity in contravention of the general prohibition,
 the insolvency practitioner must report the matter to the Authority without delay.
- (2) "Bankruptcy order" means a bankruptcy order under Part IX of the 1986 Act (or Part IX of the 1989 Order).
- (3) "Sequestration award" means an award of sequestration under section 12 of the 1985 Act.
- (4) "Individual" includes an entity mentioned in section 374(1)(c).

374 – Authority's powers to participate in proceedings

- (1) This section applies if a person other than the Authority presents a petition to the court-
 - (a) under section 264 of the 1986 Act (or Article 238 of the 1989 Order) for a bankruptcy order to be made against an individual;
 - (b) under section 5 of the 1985 Act for the sequestration of the estate of an individual; or
 - (c) under section 6 of the 1985 Act for the sequestration of the estate belonging to or held for or jointly by the members of an entity mentioned in subsection (1) of that section.
- (2) The Authority is entitled to be heard-
 - (a) at the hearing of the petition; and
 - (b) at any other hearing in relation to the individual or entity under-
 - (i) Part IX of the 1986 Act;
 - (ii) Part IX of the 1989 Order; or
 - (iii) the 1985 Act.
- (3) A copy of the report prepared under section 274 of the 1986 Act (or Article 248 of the 1989 Order) must also be sent to the Authority.
- (4) A person appointed for the purpose by the Authority is entitled-
 - (a) to attend any meeting of creditors of the individual or entity;
 - (b) to attend any meeting of a committee established under section 301 of the 1986 Act (or Article 274 of the 1989 Order);

- (c) to attend any meeting of commissioners held under paragraph 17 or 18 of Schedule 6 to the 1985 Act; and
- (d) to make representations as to any matter for decision at such a meeting.
- (5) "Individual" means an individual who-
 - (a) is, or has been, an authorised person; or
 - (b) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.
- (6) "Entity" means an entity which-
 - (a) is, or has been, an authorised person; or
 - (b) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.

Provisions against debt avoidance

375 – Authority's right to apply for an order

- (1) The Authority may apply for an order under section 423 of the 1986 Act (or Article 367 of the 1989 Order) in relation to a debtor if-
 - (a) at the time the transaction at an undervalue was entered into, the debtor was carrying on a regulated activity (whether or not in contravention of the general prohibition); and
 - (b) a victim of the transaction is or was party to an agreement entered into with the debtor, the making or performance of which constituted or was part of a regulated activity carried on by the debtor.
- (2) An application made under this section is to be treated as made on behalf of every victim of the transaction to whom subsection (1)(b) applies.
- (3) Expressions which are given a meaning in Part XVI of the 1986 Act (or Article 367, 368 or 369 of the 1989 Order) have the same meaning when used in this section.

Supplemental provisions concerning insurers

376 – Continuation of contracts of long-term insurance where insurer in liquidation

- (1) This section applies in relation to the winding up of an insurer which effects or carries out contracts of long-term insurance.
- (2) Unless the court otherwise orders, the liquidator must carry on the insurer's business so far as it consists of carrying out the insurer's contracts of long-term insurance with a view to its being transferred as a going concern to a person who may lawfully carry out those contracts.
- (3) In carrying on the business, the liquidator-
 - (a) may agree to the variation of any contracts of insurance in existence when the winding up order is made; but
 - (b) must not effect any new contracts of insurance.
- (4) If the liquidator is satisfied that the interests of the creditors in respect of liabilities of the insurer attributable to contracts of long-term insurance effected by it require the appointment of a special manager, he may apply to the court.
- (5) On such an application, the court may appoint a special manager to act during such time as the court may direct.
- (6) The special manager is to have such powers, including any of the powers of a receiver or manager, as the court may direct.
- (7) Section 177(5) of the 1986 Act (or Article 151(5) of the 1989 Order) applies to a special manager appointed under subsection (5) as it applies to a special manager appointed under section 177 of the 1986 Act (or Article 151 of the 1989 Order).

- (8) If the court thinks fit, it may reduce the value of one or more of the contracts of long-term insurance effected by the insurer.
- (9) Any reduction is to be on such terms and subject to such conditions (if any) as the court thinks fit.
- (10) The court may, on the application of an official, appoint an independent actuary to investigate the insurer's business so far as it consists of carrying out its contracts of long-term insurance and to report to the official-
 - (a) on the desirability or otherwise of that part of the insurer's business being continued; and
 - (b) on any reduction in the contracts of long-term insurance effected by the insurer that may be necessary for successful continuation of that part of the insurer's business.
- (11) "Official" means-
 - (a) the liquidator;
 - (b) a special manager appointed under subsection (5); or
 - (c) the Authority.
- (12) The liquidator may make an application in the name of the insurer and on its behalf under Part VII without obtaining the permission that would otherwise be required by section 167 of, and Schedule 4 to, the 1986 Act (or Article 142 of, and Schedule 2 to, the 1989 Order).

377 – Reducing the value of contracts instead of winding up

- (1) This section applies in relation to an insurer which has been proved to be unable to pay its debts.
- (2) If the court thinks fit, it may reduce the value of one or more of the insurer's contracts instead of making a winding up order.
- (3) Any reduction is to be on such terms and subject to such conditions (if any) as the court thinks fit.

378 – Treatment of assets on winding up

- (1) The Treasury may by regulations provide for the treatment of the assets of an insurer on its winding up.
- (2) The regulations may, in particular, provide for-
 - (a) assets representing a particular part of the insurer's business to be available only for meeting liabilities attributable to that part of the insurer's business;
 - (b) separate general meetings of the creditors to be held in respect of liabilities attributable to a particular part of the insurer's business.

379 – Winding-up rules

- (1) Winding-up rules may include provision-
 - (a) for determining the amount of the liabilities of an insurer to policyholders of any class or description for the purpose of proof in a winding up; and
 - (b) generally for carrying into effect the provisions of this Part with respect to the winding up of insurers.
- (2) Winding-up rules may, in particular, make provision for all or any of the following matters-
 - (a) the identification of assets and liabilities;
 - (b) the apportionment, between assets of different classes or descriptions, of-
 - (i) the costs, charges and expenses of the winding up; and
 - (ii) any debts of the insurer of a specified class or description;
 - (c) the determination of the amount of liabilities of a specified description;
 - (d) the application of assets for meeting liabilities of a specified description;

- (e) the application of assets representing any excess of a specified description.
- (3) "Specified" means specified in winding-up rules.
- (4) "Winding-up rules" means rules made under section 411 of the 1986 Act (or Article 359 of the 1989 Order).
- (5) Nothing in this section affects the power to make winding-up rules under the 1986 Act or the 1989 Order.
- ...

424 – Insurance

- (1) In this Act, references to-
 - (a) contracts of insurance,
 - (b) reinsurance,
 - (c) contracts of long-term insurance,
 - (d) contracts of general insurance,
 are to be read with section 22 and Schedule 2.
- (2) In this Act "policy" and "policyholder", in relation to a contract of insurance, have such meaning as the Treasury may by order specify.
- (3) The law applicable to a contract of insurance, the effecting of which constitutes the carrying on of a regulated activity, is to be determined, if it is of a prescribed description, in accordance with regulations made by the Treasury.

Financial Services And Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001

(SI 2001/3625)

1 – Citation, commencement and interpretation

- (1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 and come into force on 1st December 2001.
- (2) In these Regulations
 - "the Act" means the Financial Services and Markets Act 2000;
 - "the parties" means the authorised person concerned and the transferee (within the meaning of section 105(2) or, as the case may be, section 106(2) of the Act);
 - "the report" means the scheme report mentioned in section 109(1) of the Act;
 - "State of the commitment" has the meaning given by paragraph 6(1) of Schedule 12 to the Act;
 - "State in which the risk is situated" has the meaning given by paragraph 6(3) of Schedule 12 to the Act;
 - "a summary of the report" means a summary of the report sufficient to indicate the opinion of the person making the report of the likely effects of the insurance business transfer scheme on the policyholders of the parties.

2 – Meaning of "commitment"

There is prescribed for the purposes of paragraph 6(2) of Schedule 12 to the Act any contract of insurance of a kind referred to in Article I of the first life insurance directive.

3 – Transfer of an insurance business

- (1) An applicant under section 107 of the Act for an order sanctioning an insurance business transfer scheme ("the scheme") must comply with the following requirements.
 - (2) A notice stating that the application has been made must be
 - (a) published
 - (i) in the London, Edinburgh and Belfast Gazettes;
 - (ii) in two national newspapers in the United Kingdom; and
 - (iii) where, as regards any policy included in the proposed transfer, an EEA State other than the United Kingdom is the State of the commitment or the State in which the risk is situated, in two national newspapers in that EEA State; and
 - (b) sent to every policyholder of the parties.
 - (3) The notices mentioned in paragraph (2) must
 - (a) be approved by the Authority prior to publication (or, as the case may be, being sent); and
 - (b) contain the address from which the documents mentioned in paragraph (4) may be obtained.
 - (4) A copy of the report and a statement setting out the terms of the scheme and containing a summary of the report must be given free of charge to any person who requests them.
 - (5) A copy of the application, the report and the statement mentioned in paragraph (4) must be given free of charge to the Authority.
 - (6) In the case of any such scheme as is mentioned in section 105(5) of the Act, copies of the documents listed in paragraph 6(1) of Schedule 15B to the Companies Act 1985 or in paragraph 6(1) of Schedule 15B to the Companies (Northern Ireland) Order 1986 (application of provisions about compromises and arrangements to mergers and divisions of public companies) must be given to the Authority by the beginning of the period referred to in paragraph 3(e) of that Schedule.
- 4.
- (1) Subject to paragraph (2), the court may not determine an application under section 107 for an order sanctioning an insurance business transfer scheme
 - (a) where the applicant has failed to comply with the requirements in regulation 3(2), (3) or (6); and
 - (b) until a period of not less than twenty-one days has elapsed since the Authority was given the documents mentioned in regulation 3(5).
 - (2) The requirements in regulation 3(2)(a)(ii) and (iii) and (b) may be waived by the court in such circumstances and subject to such conditions as the court considers appropriate.

...

Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001

(SI 2001/3626)

[Editorial note: origin: FSMA 2000, s.323]

1 – Citation and commencement

This Order may be cited as the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001 and comes into force on 1st December 2001.

2 – Interpretation

In this Order "the Act" means the Financial Services and Markets Act 2000; "the Council" and "the Society" have the same meaning as in Lloyd's Act 1982; "former underwriting member" has the meaning given by section 324(l) of the Act.

3 The following provisions, that is to say

- (a) sections 104 and 107 to 114 of the Act;
- (b) any regulations made under section 108 of the Act; and
- (c) Part I of Schedule 12 to the Act;

apply in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society or former underwriting members ("the members concerned") in the same way as they apply in relation to insurance business transfer schemes, but only if the conditions specified by article 4 are satisfied.

4 The conditions referred to in article 3 are

- (a) that the scheme results in the business transferred being carried on from an establishment of the transferee in an EEA State;
- (b) that the Council of Lloyd's has by resolution authorised one person to act, in connection with the transfer for the members concerned, as transferor; and
- (c) that a copy of the resolution has been given to the Authority.

5.

(1) The provisions which apply by virtue of paragraph (a) and (b) of article 3 do so as if

- (a) any reference to the authorised person concerned were a reference to the members concerned; and
- (b) anything done in connection with the transfer by the person authorised in accordance with paragraph (a) of article 4 had been done by the members concerned for whom he acted.

(2) In the application of Part I of Schedule 12 to the Act to the members concerned, the conditions in sub-paragraphs (2)(a), (3)(a) and (4)(a) of paragraph I of that Schedule are treated as satisfied.

Lloyd's Act 1871, recitals; ss.1, 2, 3, 40

An Act for incorporating the members of the Establishment or Society formerly held at Lloyd's Coffee House in the Royal Exchange in the City of London, for the effecting of Marine Insurance, and generally known as Lloyd's; and for other purposes. [25th May, 1871.]

[Editorial note: recital numbers editorially added.]

- [1] WHEREAS there has long existed in the Royal Exchange in the City of London an Establishment or Society formerly held at Lloyd's Coffee House in the Royal Exchange, for the effecting of marine insurance, and generally known as Lloyd's:
- [2] And whereas the Society is regulated by a deed of association, dated on or about the thirtieth day of August one thousand eight hundred and eleven, which deed, or a deed of accession referring thereto, has usually been from time to time executed by the several members of the Society, and the Society is governed by rules or regulations from time to time made under that deed:
- [3] And whereas the affairs of the Society, and the business conducted by its members as such, are of large and increasing magnitude and importance, but the constitution of the Society is imperfect, and difficulties arise therefrom in relation to legal proceedings, and the management of the affairs of the Society and the incorporation of its members with proper powers would be of great benefit to the shipping and mercantile interests of the United Kingdom, and it is therefore expedient that they be incorporated, and that provision be made for the government of the Society and the conduct of its affairs:
- [4] And whereas by section four hundred and forty-eight of the Merchant Shipping Act, 1854, it is enacted to the effect that any receiver of wreck, or in his absence any justice of the peace, shall, as soon as conveniently may be, examine on oath any person belonging to any ship which may be or may have been in distress on the coast of the United Kingdom, or any other person who may be able to give an account thereof or of the cargo or stores thereof, as to the matters in that section specified, and that the receiver or justice shall take the examination down in writing, and shall make two copies of the same, of which he shall send one to the Board of Trade and the other to the Secretary of the Committee for managing the affairs of Lloyd's in London, and such lastmentioned copy shall be placed by the said Secretary in some conspicuous situation for the inspection of persons desirous of examining the same:
- [5] And whereas it will be necessary on the incorporation of the Society to secure the continuance of the operation of the said section:
- [6] And whereas the capital stock of the Society consisted on the first day of December 1870 of the sum of forty-eight thousand pounds three pounds per centum consolidated annuities standing in the names of four persons being trustees for the Society:
- [7] And whereas in or about the year 1799 a vessel of war of the royal navy, named the *Lutine*, was wrecked on the coast of Holland with a considerable amount of specie on board, insured by underwriters at Lloyd's, being members of the Society, and others, and Holland being then at war with this country the vessel and cargo were captured, and some years afterwards the King of the Netherlands authorised certain undertakers to attempt the further salvage of the cargo on the conditions (among others) that they should pay all expenses, and that one half of all that should be recovered should belong to them, and that the other half should go to the Government of the Netherlands, and subsequently the King of the Netherlands ceded to King George the Fourth on behalf of the Society of Lloyd's, the share in the cargo which had been so reserved to the Government of the Netherlands:
- [8] And whereas from time to time operations of salvaging from the wreck of the *Lutine* have been carried on, and a portion of the sum recovered, amounting to about twenty-five thousand pounds, is by virtue of the cession aforesaid in the custody or under the control of the Committee for managing the affairs of Lloyd's:
- [9] And whereas, by reason of the mode in which the business of insurance has always been carried on by members of the Society, the names of those who underwrite a particular policy cannot, when a considerable time has elapsed, be traced with certainty, if at all, especially as regards policies anterior in date to one thousand eight hundred and thirty-eight, in which year the books

and papers relating to the affairs of the Society were lost in the fire which destroyed the Royal Exchange:

- [10] And whereas it is expedient that the operations of salving from the wreck of the Lutine be continued, and that provision be made for the application in that behalf, as far as may be requisite, of money that may hereafter be received from those operations, and for the application to public or other purposes of the aforesaid sum of twenty-five thousand pounds, and of the unclaimed residue of money to be hereafter received as aforesaid:
- [11] And whereas it is expedient that various powers be conferred on the Society as incorporated, and that its functions be as far as may be defined:
- [12] And whereas it is expedient that provision be made for the incorporation, from time to time, by agreement, with the Society, of other societies, associations, companies, or corporations instituted for purposes connected with shipping or marine insurance:
- [13] And whereas the objects aforesaid cannot be attained without the authority of Parliament:

May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say),

1 – Short title

This Act may be cited as Lloyd's Act, 1871.

2 – Cessor of existing constitution

On the passing of this Act, the deed of association, dated on or about the thirtieth day of August one thousand eight hundred and eleven, executed by members of the Establishment or Society of Lloyd's as existing before the passing of this Act, and any deed executed by other members by way of accession thereto, shall be and the same are and each of them is hereby annulled.

3 – Incorporation of Lloyd's

The Right Honourable George Joachim Goschen, William Simpson, James Leverton Wylie, William Young, Henry Casper Heintz, Frederic Bernstein Bernard Natusch, James Bischoff, George Dorman Tyser, Michael Wills, William Wilson Saunders, Leonard Charles Wakefield, and Thomas Chapman, and all persons admitted as members of Lloyd's before or after the passing of this Act, are hereby united into a Society and Corporation for the purposes of this Act, and for those purposes are hereby incorporated by the name of Lloyd's, and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose, of lands and other property (which incorporated body is hereafter in this Act referred to as the Society).

...

40 – Saving for liability of members, &c.

Nothing in this Act shall confer limited liability on the members of the Society, or in any manner restrict the liability of any member thereof in respect of his individual undertakings, or make any member of the Society as such responsible in any manner for any of the undertakings, debts, or liabilities of any other member of the Society as such, or affect or interfere with or empower the Society or the Committee to interfere with any business whatever other than the business of insurance carried on by any member of the Society.

...

Lloyd's Act 1911, recitals; ss.1-4, 7, 9

An Act to Extend the Objects of and confer Further Powers on Lloyd's and to Amend Lloyd's Act 1871 [18th August, 1911]

[Editorial note: recital numbers editorially added.]

- [1] WHEREAS by Lloyd's Act 1871 (in this Act referred to as "the Act of 1871") certain persons were united into a Society or Corporation for the purposes of that Act and were incorporated by the name of Lloyd's (which incorporated body was in the Act of 1871 and is in this Act referred to as "the Society") and various powers were conferred on the Society by the said Act:
- [2] And whereas by the Act of 1871 the objects of the Society were declared inter alia to be the carrying on of the business of marine insurance by Members of the Society and the protection of the interests of Members of the Society and the collection publication and diffusion of intelligence and information:
- [3] And whereas further powers were conferred on the Society and further provisions made with reference to the Society by Lloyd's Act 1888 and Lloyd's Signal Stations Act 1888:
- [4] And whereas the Members of the Society have in the past carried on at Lloyd's insurance business other than marine insurance and it is expedient that the objects of the Society should be extended to the carrying on of the business of insurance other than marine insurance by Members of the Society and that further powers should be conferred on the Society and the Committee of Lloyd's as hereinafter in this Act provided:
- [5] And whereas by the Act of 1871 it was directed that the capital stock of the Society should be transferred to and kept in the names of four Members of the Society as Trustees for the Members of the Society and such capital stock now stands in the names of certain Members of the Society (hereinafter in this Act called "the Trustees of the capital stock") as Trustees for the Society and its Members as in the said Act mentioned and it is expedient that the capital stock should be transferred to and held by the Society:
- [6] And whereas in pursuance of the Assurance Companies Act 1909 or the regulations or requirements for the time being of the Society or the Committee or otherwise Members of the Society furnish security in the form of either a deposit with a trust deed or a guarantee or guarantees or partly in the one form and partly in the other which security is available solely for the purpose of meeting their liabilities in respect of policies underwritten by them or on their account at Lloyd's and the Society have in the past acted as Trustee of certain of such trust deeds and guarantees either solely or jointly with others and doubts have arisen as to the power of the Society to so act and it is expedient that the action of the Society in acting as such Trustee in the past should be confirmed and that the Society should be authorised to act as Trustee of any trust deed or guarantee furnished by any Member of the Society as aforesaid:
- [7] And whereas it is expedient that the Society should be authorised itself to act as guarantor either solely or jointly with any other guarantor or guarantors as hereinafter in this Act provided and that the Society should in certain cases be authorised to make good any deficiency arising by reason of the default of any guarantor or the insufficiency of any security furnished by Members of the Society as aforesaid:
- [8] And whereas the purposes aforesaid cannot be effected without the authority of Parliament:

MAY IT THEREFORE PLEASE YOUR MAJESTY That it may be Enacted AND BE IT ENACTED by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—

1 – Short and collective titles

This Act may be cited as Lloyd's Act 1911 and the Act of 1871 Lloyd's Signal Stations Act 1888 and this Act may be cited and are hereinafter in this Act referred to as Lloyd's Acts 1871 to 1911.

2 – Definition

In this Act the expression “the Committee” shall mean the Committee of Lloyd’s constituted under the Act of 1871.

3 – Extension of Objects

The objects of the Society are hereby extended so as to include the carrying on of the business of insurance of every description including guarantee business by Members of the Society and the Act of 1871 shall be read and have effect accordingly.

4 – Objects of Society

Section 10 of the Act of 1871 and Lloyd’s Act 1888 are hereby repealed and in lieu thereof the following provision is hereby enacted and shall have effect accordingly:—

The objects of the Society shall be:—

The carrying on by Members of the Society of the business of insurance of every description including guarantee business;

The advancement and protection of the interests of Members of the Society in connection with the business carried on by them as Members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise;

The collection publication and diffusion of intelligence and information;

The doing of all things incidental or conducive to the fulfilment of the objects of the Society.

...

7 – Purposes for which capital stock, &c. to be held by Society

The Society shall hold the funds and property of the Society and the income therefrom for all or any of the following purposes:—

- (a) for defraying the costs, charges and expenses incurred by the Society, the Council or otherwise in the execution and carrying out of Lloyd’s Acts 1871 to 1982;
- (b) for furthering the objects of the Society;
- (c) for making good any default by any member of the Society under any contract of insurance underwritten at Lloyd’s which in the opinion of the Council it is in the interests of the members of the Society to make good;
- (d) for guaranteeing or securing, in such manner as the Council think fit, any debt or obligation of or binding on the Society, any of its subsidiaries or any other person;
- (e) for such other purposes (if any) as may from time to time be prescribed by byelaw;

and subject thereto for the benefit of the members of the Society jointly.

...

9 – Powers to Society with reference to guarantees

Without prejudice to the provisions of section 7 of this Act the Society may either by itself or jointly with any other guarantor or guarantors guarantee the payment of claims and demands upon contracts of insurance underwritten at Lloyd’s and the Society may for such purposes enter into contracts and may apply the funds and property of the Society and the income therefrom or any part thereof for the purpose of discharging any liabilities of the Society under any guarantees or contracts as aforesaid and the powers conferred on the Society by this section may be exercised by the Council in accordance with byelaws made under Lloyd’s Act, 1982.

...

Lloyd's Act 1951, recitals; ss.1, 3, 5

An Act to confer further powers on Lloyd's to amend Lloyd's Acts 1871 and 1925 and for other purposes. [26th April 1951]

[Editorial note: recital numbers editorially added.]

- [1] WHEREAS by Lloyd's Act 1871 (in this Act referred to as "the Act of 1871") certain persons were united into a society or corporation for the purposes of that Act and were incorporated by the name of Lloyd's (which incorporated body was in the Act of 1871 and is in this act referred to as "the Society") and various powers were conferred upon the Society by the said Act:
- [2] And whereas by Lloyd's Act 1911 the objects of the Society were extended and now include the carrying on by members of the Society of the business of insurance of every description including guarantee business the advancement and protection of the interests of members of the Society in connection with the business carried on by them as members of the Society and in respect of shipping and cargoes and freight and other insurable property or insurable interests or otherwise the collection publication and diffusion of intelligence and information and the doing of all things incidental or conducive to the fulfilment of the objects of the Society:
- [3] And whereas further powers were conferred on the Society and further provisions were made with reference to the Society by Lloyd's Signal Stations Act 1888 Lloyd's Act 1911 and Lloyd's Act 1925:
- [4] And whereas the number of and the business carried on by members of the Society and the activities of the Society have increased and are increasing and the Society desires to erect and fit up new premises for its accommodation and the accommodation of its members and for other purposes and to borrow money but doubts have arisen as to whether it has power to borrow for that or any other purpose and it is expedient that the provisions of this Act with respect thereto be enacted:
- [5] And whereas in addition to members there are annual subscribers to and associates of the Society and others who may be granted admission to the rooms of the Society and who enjoy such privileges as the committee of the Society from time to time determine:
- [6] And whereas under section 8 of Lloyd's Act 1911 the Society may act as trustee either solely or jointly with any other person of any trust deed or guarantee or other document furnished to the Society by any member of the Society as security for meeting his liabilities under policies underwritten by him or on his account at Lloyd's and it is expedient to extend the powers of the Society under that section in manner provided by this Act:
- [7] And whereas under section 9 of Lloyd's Act 1911 the Society may for the purposes mentioned in that section either by itself or jointly with any other guarantor or guarantors guarantee the payment of claims and demands upon policies of insurance including guarantees underwritten by members of the Society or on their account at Lloyd's subject as mentioned in the said section and it is expedient to extend the powers of the Society under that section in manner provided by this Act:
- [8] And whereas it is expedient that the other provisions of this Act be enacted:
- [9] And whereas the objects of this Act cannot be effected without the authority of Parliament:

May it therefore please Your Majesty that it may be enacted and be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—

1 – Short and collective titles

- (1) This Act may be cited as Lloyd's Act 1951.
- (2) Lloyd's Acts 1871 to 1925 and this Act may be cited together as Lloyd's Acts 1871 to 1951.

...

3 – Powers of Society to borrow

- (1) The Society may raise or borrow money and secure the same and any interests thereon upon any property of the Society either in order to acquire any land or to develop and turn to account any land acquired by or in which the Society is interested (and in particular by constructing altering pulling down reconstructing decorating furnishing fitting up maintaining and improving buildings and whether the same shall be intended for occupation or part occupation of the Society or its members or subscribers or otherwise) or for any other purpose of the Society.
- (2) The powers conferred on the Society by this section may be exercised by the committee.
- ...

5 – Society may act as trustee for certain purposes

- (1) It shall be lawful and shall be deemed always to have been lawful for the Society to act as trustee either solely or jointly with any other person of any trust deed or guarantee or other document relating to the insurance business carried on at Lloyd's by members of or annual subscribers to the Society.
- (2) Any trustee or trustees of any such trust deed or guarantee or other document as aforesaid may transfer any trust fund subject to any such trust deed guarantee or document to the Society and assign to the Society the benefit or advantage to which he or they are entitled under any such trust deed guarantee or document and on the execution of such transfer or deed of assignment the Society shall be entitled to such trust fund and to all benefits and advantages under any such trust deed guarantee or document in the same manner and to the same extent and on the same trusts as such trustees held or were entitled to the same.
- (3) Section 8 (Society may act as trustee for certain purposes) of the Act of 1911 is hereby repealed.
- (4)
 - (a) Notwithstanding the repeal of the said section 8 any trust deed guarantee document transfer deed of assignment or other instrument of whatsoever nature entered into or made under the powers of that section and in force immediately before the passing of this Act shall continue in full force and effect in every respect and may be enforced as fully and effectually as if that section had not been repealed.
 - (b) The mention of particular matters in this subsection shall not be held to prejudice or affect the general application of section 38 (Effect of repeal in future Acts) of the Interpretation Act 1889 with regard to the effect of repeals.
- ...

Lloyd's Act 1982, recitals; ss.1, 2, 6, 8, 9, 13, 14; Sch. 1

An Act to establish a Council of Lloyd's; to define the functions and powers of the said Council; to amend and repeal certain provisions of Lloyd's Acts 1871 to 1951; and for other purposes. [23rd July 1982]

WHEREAS —

- (1) By Lloyd's Act 1871 certain persons were united into a society or corporation for the purposes of that Act and were incorporated by the name of Lloyd's (hereinafter referred to as "the Society") and various powers were conferred upon the Society by the said Act:
- (2) By the said Act of 1871 there was established a committee of members of the Society called the Committee of Lloyd's to have the management and superintendence of the affairs of the Society and to exercise all the powers of the Society (except as by the said Act provided), subject to control and regulation by a general meeting of the members of the Society:
- (3) By the said Act of 1871 the members of the Society in general meeting were empowered to make byelaws for the purposes provided in that Act and generally for the better execution of the

Act and the furtherance of the objects of the Society, and byelaws have from time to time been so made:

- (4) Further powers were conferred on the Society and on the members of the Society in general meeting by the Lloyd's Act 1911, Lloyd's Act 1925 and Lloyd's Act 1951:
- (5) Since 1968 the number of persons resident outside the United Kingdom admitted as members of the Society and the total number of members of the Society have both greatly increased so that it is no longer practical or expedient for the members of the Society to exercise in general meeting the powers reserved to them, by the Acts hereinbefore mentioned:
- (6) It is expedient in order to enable the Society to regulate the management of its affairs in accordance with both present-day requirements and practice and the interests of Lloyd's policyholders that —
 - (a) there should be established a Council of Lloyd's to have control over the management and regulation of the affairs of the Society;
 - (b) the said Council should have power to make byelaws for the purposes of such management and regulation, including byelaws making provision for and regulating the admission, suspension and disciplining of members of the Society, Lloyd's brokers, underwriting agents and others; and
 - (c) certain provisions in Lloyd's Acts 1871 to 1951 should be amended or repealed:
- (7) It is expedient that the other provisions contained in this Act should be enacted:
- (8) The purposes of this Act cannot be achieved without the authority of Parliament:

...

1 – Citation

- (1) This Act may be cited as Lloyd's Act 1982.
- (2) Lloyd's Acts 1871 to 1951 and this Act may be cited together as Lloyd's Acts 1871 to 1982.

2 – Interpretation

- (1) In this Act, unless the context otherwise requires —

...

“member of the Society” means a person admitted to membership of the Society;

...

“non-underwriting member” means a member of the Society who is not an underwriting member;

...

“the Society” means the society incorporated by the Act of 1871 by the name of Lloyd's;

“special resolution” means a resolution of the Council passed by separate majorities of both —

- (a) all the working members of the Council for the time being; and
- (b) all the members for the time being of the Council who are not working members of the Council as aforesaid, that is to say, the external members of the Council and the nominated members of the Council;

...

“underwriting agent” means a person permitted by the Council to act as an underwriting agent at Lloyd's;

“underwriting member” means a person admitted to the Society as an underwriting member;

“working member of the Council” means a member of the Council elected pursuant to section 3(2)(a) of this Act;

“working member of the Society” means —

- (a) a member of the Society who occupies himself principally with the conduct of business at Lloyd's by a Lloyd's broker or underwriting agent; or
- (b) a member of the Society who has gone into retirement but who immediately before his retirement so occupied himself.

...

6 – Powers of the Council and of the Committee

- (1) The Council shall have the management and superintendence of the affairs of the Society and the power to regulate and direct the business of insurance at Lloyd's and it may lawfully exercise all the powers of the Society, but all powers so exercised by the Council shall be exercised by it in accordance with and subject to the provisions of Lloyd's Acts 1871 to 1982 and the byelaws made thereunder.
- (2) The Council may —
 - (a) make such byelaws as from time to time seem requisite or expedient for the proper and better execution of Lloyd's Acts 1871 to 1982 and for the furtherance of the objects of the Society, including such byelaws as it thinks fit for any or all of the purposes specified in Schedule 2 to this Act; and
 - (b) amend or revoke any byelaw made or deemed to have been made hereunder.
- (3) Any byelaw made under this Act and any amendment or revocation of any byelaw so made or deemed to have been so made shall be made by special resolution.
- (4)
 - (a) If, within 60 days of the promulgation of any byelaw or of the promulgation of any amendment to or revocation of any byelaw, or within such longer period as the Council may determine, a notice in writing signed by not less than 500 members of the Society is served upon the Council requesting that such byelaw, amendment or revocation be submitted to the members of the Society in general meeting, the Council shall convene a general meeting of the Society for that purpose.
 - (b) If, at a meeting of the members of the Society convened pursuant to paragraph (a) above, a resolution to revoke such byelaw or amendment or to annul such revocation is passed by a majority of members voting in person or by proxy and the number of members in favour of such resolution represents at least one-third of the total membership of the Society, such byelaw, amendment or revocation shall thereby be revoked or annulled, as the case may be.
 - (c) A resolution passed pursuant to paragraph (b) above shall not affect anything done or omitted to be done before the resolution is passed, and in particular —
 - (i) in the case of a resolution revoking a byelaw or amendment, shall not affect the previous operation of the byelaw or amendment;
 - (ii) in the case of a resolution annulling the revocation of a byelaw, shall revive the byelaw only from the date of the resolution.
 - (d) The Council shall by byelaw regulate the calling and conduct of meetings convened pursuant to paragraph (a) above and the system of voting thereat.

...

8 – Insurance business

- (1) An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another, and if the liability of each underwriting member is accepted solely for his own account.
- (2) An underwriting member (not being himself an underwriting agent) shall underwrite contracts of insurance at Lloyd's only through an underwriting agent.
- (3) An underwriting member shall in the course of his underwriting business at Lloyd's accept or place business only from or through a Lloyd's broker or such other person as the Council may from time to time by byelaw permit.

- (4) Breach of any of subsections (1) to (3) above shall constitute an act or default in respect of which disciplinary proceedings may be brought in accordance with byelaws made under section 7 (The Disciplinary Committee and the Appeal Tribunal) of this Act.

9 – Cessation of membership on bankruptcy

In the event of a member of the Society being adjudicated bankrupt, or being adjudicated or declared insolvent, by the due process of law of a country within the European Economic Community the Council shall forthwith declare his membership to have ceased:

Provided that if such adjudication or declaration is set aside on appeal or otherwise the Council shall take immediate action to cancel its declaration.

...

13 – Application of certain provisions of Companies Act 1948

- (1) Sections 34, 36 and 448 of the Companies Act 1948 (execution of deeds abroad, authentication of documents and relief for the liabilities of officers and auditors of a company) are hereby incorporated in this Act and shall apply to the Society, the Council, the Committee and officers and auditors of the Society in like manner *mutatis mutandis* as they apply to a company (as defined by the Companies Act 1948), its officers and auditors.
- (2) For the purpose of this Act any member of the Council and any person to whom (whether individually or collectively) any powers or functions are delegated under this Act is to be regarded as an officer of the Society.

14 – Liability of the Society, etc.

- (1) This section shall only exempt the Society from liability in damages at the suit of a member of the Lloyd's community.
- (2) For the purposes of this section a member of the Lloyd's community shall be —
- (a) a person who is —
- (i) a member of the Society;
 - (ii) a Lloyd's broker;
 - (iii) an underwriting agent;
 - (iv) an annual subscriber;
 - (v) an associate;
 - (vi) a director or partner of a Lloyd's broker or an underwriting agent;
 - (vii) a person who works for a Lloyd's broker or underwriting agent as a manager;
- or
- (b) a person who has been a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above; or
- (c) a person who is seeking or who has sought to become a member of the Lloyd's community in one or more of the capacities listed in paragraph (a) above.
- (3) Subject to subsections (1), (4) and (5) of this section, the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation made thereunder —
- (a) in so far as the underwriting business of any member of the Society or the costs of his membership or the business of any person as a Lloyd's broker or underwriting agent may be affected; or
 - (b) in so far as relates to the admission or non-admission to, or the continuance of, or the suspension or exclusion from, membership of the Society; or

- (c) in so far as relates to grant, continuance, suspension, withdrawal or refusal of permission to carry on business at Lloyd's as a Lloyd's broker or an underwriting agent or in any capacity connected therewith; or
- (d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or
- (e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws made pursuant to paragraphs (21), (22), (23), (24) and (25) of schedule 2 to this Act;

unless the act or omission complained of —

- (i) was done or omitted to be done in bad faith; or
 - (ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do not involve the exercise of any discretion.
- (4) Nothing in this section shall affect the liability of the Society in respect of the death of or personal injury to any person, and for the purposes of this section the expression "personal injury" means bodily injury, any disease and any impairment of a person's physical or mental condition.
 - (5) Nothing in this section shall exempt the Society from liability for libel or slander.
 - (6) For the purposes of this section "the Society" means the Society itself and also any of its officers and employees and any person or persons in or to whom (whether individually or collectively) any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871 to 1982.

...

SCHEDULE 1

CLASSIFICATION OF MEMBERS OF THE SOCIETY

- 1. The Council shall keep and maintain a Register to be revised as at the first day of July in each year (or such other day or days the Council may byelaw provide) which shall be divided into two parts and shall show in Part I thereof the names of all those members of the Society who were classified as working members of the Society as at that date and Part II thereof the names of all those members of the Society who were classified as external members of the Society as at that date.
- 2. A member of the Society may object to his or another member's classification on the Register and the Council shall by byelaw, make provision for the determination of such an objection.
- 3. A member of the Society may appeal against a determination under paragraph 2 above to a committee of the Council consisting of one working member, one external member and one nominated member of the Council whose decision shall be conclusive and the Council shall by byelaw make provision for the hearing and determination of such an appeal.
- 4. In any election to the Council a member of the Society shall be entitled and only entitled to vote as a working member of the Society or as an external member of the Society according to his classification on the Register on the date on which notice of such election is given.
- 5. Such Register shall be available for inspection by a member of the Society upon request at the premises of the Society in the city of London, or such other place as the Council shall specify.

...

Reorganisation Directive

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

(1) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance (4), as supplemented by Directive 92/49/EEC (5), and the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (6), as supplemented by Directive 92/96/EEC (7), provide for a single authorisation of the insurance undertakings granted by the home Member State supervisory authority. This single authorisation allows the insurance undertaking to carry out its activities in the Community by means of establishment or free provision of services without any further authorisation by the host Member State and under the sole prudential supervision of the home Member State supervisory authorities.

(2) The insurance directives providing a single authorisation with a Community scope for the insurance undertakings do not contain coordination rules in the event of winding-up proceedings. Insurance undertakings as well as other financial institutions are expressly excluded from the scope of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (8). It is in the interest of the proper functioning of the internal market and of the protection of creditors that coordinated rules are established at Community level for winding-up proceedings in respect of insurance undertakings.

(3) Coordination rules should also be established to ensure that the reorganisation measures, adopted by the competent authority of a Member State in order to preserve or restore the financial soundness of an insurance undertaking and to prevent as much as possible a winding-up situation, produce full effects throughout the Community. The reorganisation measures covered by this Directive are those affecting pre-existing rights of parties other than the insurance undertaking itself. The measures provided for in Article 20 of Directive 73/239/EEC and Article 24 of Directive 79/267/EEC should be included within the scope of this Directive provided that they comply with the conditions contained in the definition of reorganisation measures.

(4) This Directive has a Community scope which affects insurance undertakings as defined in Directives 73/239/EEC and 79/267/EEC which have their head office in the Community, Community branches of insurance undertakings which have their head office in third countries and creditors resident in the Community. This Directive should not regulate the effects of the reorganisation measures and winding-up proceedings vis-à-vis third countries.

(5) This Directive should concern winding-up proceedings whether or not they are founded on insolvency and whether they are voluntary or compulsory. It should apply to collective proceedings as defined by the home Member State's legislation in accordance with Article 9 involving the realisation of the assets of an insurance undertaking and the distribution of their proceeds. Winding-up proceedings which, without being founded on insolvency, involve for the payment of insurance claims a priority order in accordance with Article 10 should also be included in the scope of this Directive. Claims by the employees of an insurance undertaking arising from employment contracts and employment relationships should be capable of being subrogated to a national wage guarantee scheme; such subrogated claims should benefit from the treatment determined by the home Member State's law (*lex concursus*) according to the principles of this Directive. The provisions of this Directive should apply to the different cases of winding-up proceedings as appropriate.

(6) The adoption of reorganisation measures does not preclude the opening of winding-up proceedings. Winding-up proceedings may be opened in the absence of, or following, the adoption of reorganisation

measures and they may terminate with composition or other analogous measures, including reorganisation measures.

(7) The definition of branch, in accordance with existing insolvency principles, should take account of the single legal personality of the insurance undertaking. The home Member State's legislation should determine the way in which the assets and liabilities held by independent persons who have a permanent authority to act as agent for an insurance undertaking should be treated in the winding-up of an insurance undertaking.

(8) A distinction should be made between the competent authorities for the purposes of reorganisation measures and winding-up proceedings and the supervisory authorities of the insurance undertakings. The competent authorities may be administrative or judicial authorities depending on the Member State's legislation. This Directive does not purport to harmonise national legislation concerning the allocation of competences between such authorities.

(9) This Directive does not seek to harmonise national legislation concerning reorganisation measures and winding-up proceedings but aims at ensuring mutual recognition of Member States' reorganisation measures and winding-up legislation concerning insurance undertakings as well as the necessary cooperation. Such mutual recognition is implemented in this Directive through the principles of unity, universality, coordination, publicity, equivalent treatment and protection of insurance creditors.

(10) Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings (principle of unity). These proceedings should produce their effects throughout the Community and should be recognised by all Member States. All the assets and liabilities of the insurance undertaking should, as a general rule, be taken into consideration in the winding-up proceedings (principle of universality).

(11) The home Member State's law should govern the winding-up decision concerning an insurance undertaking, the winding-up proceedings themselves and their effects, both substantive and procedural, on the persons and legal relations concerned, except where this Directive provides otherwise. Therefore all the conditions for the opening, conduct and closure of winding-up proceedings should in general be governed by the home Member State's law. In order to facilitate its application this Directive should include a non-exhaustive list of aspects which, in particular, are subject to the general rule of the home Member State's legislation.

(12) The supervisory authorities of the home Member State and those of all the other Member States should be informed as a matter of urgency of the opening of winding-up proceedings (principle of coordination).

(13) It is of utmost importance that insured persons, policy-holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings. Such protection should not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent himself is not responsible under such insurance contract or operation. In order to achieve this objective Member States should ensure special treatment for insurance creditors according to one of two optional methods provided for in this Directive. Member States may choose between granting insurance claims absolute precedence over any other claim with respect to assets representing the technical provisions or granting insurance claims a special rank which may only be preceded by claims on salaries, social security, taxes and rights 'in rem' over the whole assets of the insurance undertaking. Neither of the two methods provided for in this Directive impedes a Member State from establishing a ranking between different categories of insurance claims.

(14) This Directive should ensure an appropriate balance between the protection of insurance creditors and other privileged creditors protected by the Member State's legislation and not harmonise the different systems of privileged creditors existing in the Member States.

(15) The two optional methods for treatment of insurance claims are considered substantially equivalent. The first method ensures the affectation of assets representing the technical provisions to insurance claims, the second method ensures insurance claims a position in the ranking of creditors which not only affects the assets representing the technical provisions but all the assets of the insurance undertaking.

(16) Member States which, in order to protect insurance creditors, opt for the method of granting insurance claims absolute precedence with respect to the assets representing the technical provisions should require their insurance undertakings to establish and keep up to date a special register of such assets. Such a register is a useful instrument for identifying the assets affected to such claims.

(17) In order to strengthen equivalence between both methods of treatment of insurance claims, this Directive should oblige the Member States which apply the method set out in Article 10(1)(b) to require every insurance undertaking to represent, at any moment and independently of a possible winding-up, claims, which according to that method may have precedence over insurance claims and which are registered in the insurance undertaking's accounts, by assets allowed by the insurance directives in force to represent the technical provisions.

(18) The home Member State should be able to provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in such home Member State, claims by that scheme should not benefit from the treatment of insurance claims under this Directive.

(19) The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless such authorisation has previously been withdrawn.

(20) The decision to open winding-up proceedings, which may produce effects throughout the Community according to the principle of universality, should have appropriate publicity within the Community. In order to protect interested parties, the decision should be published in accordance with the home Member State's procedures and in the Official Journal of the European Communities and, further, by any other means decided by the other Member States' supervisory authorities within their respective territories. In addition to publication of the decision, known creditors who are resident in the Community should be individually informed of the decision and this information should contain at least the elements specified in this Directive. Liquidators should also keep creditors regularly informed of the progress of the winding-up proceedings.

(21) Creditors should have the right to lodge claims or to submit written observations in winding-up proceedings. Claims by creditors resident in a Member State other than the home Member State should be treated in the same way as equivalent claims in the home Member State without any discrimination on the grounds of nationality or residence (principle of equivalent treatment).

(22) This Directive should apply to reorganisation measures adopted by a competent authority of a Member State principles which are similar 'mutatis mutandis' to those provided for in winding-up proceedings. The publication of such reorganisation measures should be limited to the case in which an appeal in the home Member State is possible by parties other than the insurance undertaking itself. When reorganisation measures affect exclusively the rights of shareholders, members or employees of the insurance undertaking considered in those capacities, the competent authorities should determine the manner in which the parties affected should be informed in accordance with relevant legislation.

(23) This Directive provides for coordinated rules to determine the law applicable to reorganisation measures and winding-up proceedings of insurance undertakings. This Directive does not seek to establish rules of private international law determining the law applicable to contracts and other legal relations. In particular, this Directive does not seek to govern the applicable rules on the existence of a contract, the rights and obligations of parties and the evaluation of debts.

(24) The general rule of this Directive, according to which reorganisation measures and the winding-up proceedings are governed by the law of the home Member State, should have a series of exceptions in order to protect legitimate expectations and the certainty of certain transactions in Member States other than the home Member State. Such exceptions should concern the effects of such reorganisation measures or winding-up proceedings on certain contracts and rights, third parties' rights in rem, reservations of title, set-off, regulated markets, detrimental acts, third party purchasers and lawsuits pending.

(25) The exception concerning the effects of reorganisation measures and winding-up proceedings on certain contracts and rights provided for in Article 19 should be limited to the effects specified therein and should not include any other issues related to reorganisation measures and winding-up proceedings such as the lodging, verification, admission and ranking of claims regarding such contracts and rights, which should be governed by the home Member State's legislation.

(26) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending should be governed by the law of the Member States in which the lawsuit is pending concerning an asset or a right of which the insurance undertaking has been divested as an exception to the application of the law of the home Member State. The effects of such measures and proceedings on individual enforcement actions arising from these lawsuits should be governed by the home Member State's legislation, according to the general rule of this Directive.

(27) All persons required to receive or divulge information connected with the procedures of communication provided for in this Directive should be bound by professional secrecy in the same manner as that established in Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EEC, with the exception of any judicial authority to which specific national legislation applies.

(28) For the sole purpose of applying the provisions of this Directive to reorganisation measures and winding-up proceedings concerning branches situated in the Community of an insurance undertaking whose head office is located in a third country the home Member State should be defined as the Member State in which the branch is located and the supervisory authorities and competent authorities as the authorities of that Member State.

(29) Where there are branches in more than one Member State of an insurance undertaking whose head office is located outside the Community, each branch should be treated independently with regard to the application of this Directive. In that case the competent authorities, supervisory authorities, administrators and liquidators should endeavour to coordinate their actions,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I SCOPE AND DEFINITIONS

Article 1 — Scope

1. This Directive applies to reorganisation measures and winding-up proceedings concerning insurance undertakings.
2. This Directive also applies, to the extent provided for in Article 30, to reorganisation measures and winding-up proceedings concerning branches in the territory of the Community of insurance undertakings having their head office outside the Community.

Article 2 — Definitions

For the purpose of this Directive:

- (a) 'insurance undertaking' means an undertaking which has received official authorisation in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (b) 'branch' means any permanent presence of an insurance undertaking in the territory of a Member State other than the home Member State which carries out insurance business;
- (c) 'reorganisation measures' means measures involving any intervention by administrative bodies or judicial authorities which are intended to preserve or restore the financial situation of an insurance undertaking and which affect pre-existing rights of parties other than the insurance undertaking itself, including but not limited to measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;
- (d) 'winding-up proceedings' means collective proceedings involving realising the assets of an insurance undertaking and distributing the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the administrative or the judicial authorities of a Member State, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;
- (e) 'home Member State' means the Member State in which an insurance undertaking has been authorised in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (f) 'host Member State' means the Member State other than the home Member State in which an insurance undertaking has a branch;

- (g) 'competent authorities' means the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisation measures or the winding-up proceedings;
- (h) 'supervisory authorities' means the competent authorities within the meaning of Article 1(k) of Directive 92/49/EEC and of Article 1(l) of Directive 92/96/EEC;
- (i) 'administrator' means any person or body appointed by the competent authorities for the purpose of administering reorganisation measures;
- (j) 'liquidator' means any person or body appointed by the competent authorities or by the governing bodies of an insurance undertaking, as appropriate, for the purpose of administering winding-up proceedings;
- (k) 'insurance claims' means any amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 1(2) and (3), of Directive 79/267/EEC in direct insurance business, including amounts set aside for the aforementioned persons, when some elements of the debt are not yet known. The premiums owed by an insurance undertaking as a result of the non-conclusion or cancellation of these insurance contracts and operations in accordance with the law applicable to such contracts or operations before the opening of the winding-up proceedings shall also be considered insurance claims.

TITLE II REORGANISATION MEASURES

Article 3 — Scope

This Title applies to the reorganisation measures defined in Article 2(c).

Article 4 — Adoption of reorganisation measures — Applicable law

1. Only the competent authorities of the home Member State shall be entitled to decide on the reorganisation measures with respect to an insurance undertaking, including its branches in other Member States. The reorganisation measures shall not preclude the opening of winding-up proceedings by the home Member State.
2. The reorganisation measures shall be governed by the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in Articles 19 to 26.
3. The reorganisation measures shall be fully effective throughout the Community in accordance with the legislation of the home Member State without any further formalities, including against third parties in other Member States, even if the legislation of those other Member States does not provide for such reorganisation measures or alternatively makes their implementation subject to conditions which are not fulfilled.
4. The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken.

Article 5 — Information to the supervisory authorities

The competent authorities of the home Member State shall inform as a matter of urgency the home Member State's supervisory authorities of their decision on any reorganisation measure, where possible before the adoption of such a measure and failing that immediately thereafter. The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to adopt reorganisation measures including the possible practical effects of such measures.

Article 6 — Publication

1. Where an appeal is possible in the home Member State against a reorganisation measure, the competent authorities of the home Member State, the administrator or any person entitled to do so in the home Member State shall make public its decision on a reorganisation measure in accordance with the publication procedures provided for in the home Member State and, furthermore, publish in the Official Journal of the European Communities at the earliest

opportunity an extract from the document establishing the reorganisation measure. The supervisory authorities of all the other Member States which have been informed of the decision on a reorganisation measure pursuant to Article 5 may ensure the publication of such decision within their territory in the manner they consider appropriate.

2. The publications provided for in paragraph 1 shall also specify the competent authority of the home Member State, the applicable law as provided in Article 4(2) and the administrator appointed, if any. They shall be carried out in the official language or in one of the official languages of the Member State in which the information is published.
3. The reorganisation measures shall apply regardless of the provisions concerning publication set out in paragraphs 1 and 2 and shall be fully effective as against creditors, unless the competent authorities of the home Member State or the law of that State provide otherwise.
4. When reorganisation measures affect exclusively the rights of shareholders, members or employees of an insurance undertaking, considered in those capacities, this Article shall not apply unless the law applicable to these reorganisation measures provides otherwise. The competent authorities shall determine the manner in which the interested parties affected by such reorganisation measures shall be informed in accordance with the relevant legislation.

Article 7 — Information to known creditors — Right to lodge claims

1. Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of a reorganisation measure to creditors who have their normal place of residence, domicile or head office in that State, the competent authorities of the home Member State or the administrator shall also inform known creditors who have their normal place of residence, domicile or head office in another Member State, in accordance with the procedures laid down in Articles 15 and 17(1).
2. Where the legislation of the home Member State provides for the right of creditors who have their normal place of residence, domicile or head office in that State to lodge claims or to submit observations concerning their claims, creditors who have their normal place of residence, domicile or head office in another Member State shall have the same right to lodge claims or submit observations in accordance with the procedures laid down in Articles 16 and 17(2).

TITLE III WINDING-UP PROCEEDINGS

Article 8 — Opening of winding-up proceedings — Information to the supervisory authorities

1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This decision may be taken in the absence, or following the adoption, of reorganisation measures.
2. A decision adopted according to the home Member State's legislation concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, shall be recognised without further formality within the territory of all other Member States and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.
3. The supervisory authorities of the home Member State shall be informed as a matter of urgency of the decision to open winding-up proceedings, if possible before the proceedings are opened and failing that immediately thereafter. The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to open winding-up proceedings including the possible practical effects of such proceedings.

Article 9 — Applicable law

1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the laws, regulations and administrative provisions applicable in its home Member State unless otherwise provided in Articles 19 to 26.

2. The law of the home Member State shall determine in particular:
 - (a) the assets which form part of the estate and the treatment of assets acquired by, or devolving on, the insurance undertaking after the opening of the winding-up proceedings;
 - (b) the respective powers of the insurance undertaking and the liquidator;
 - (c) the conditions under which set-off may be invoked;
 - (d) the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;
 - (e) the effects of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending as provided for in Article 26;
 - (f) the claims which are to be lodged against the insurance undertaking's estate and the treatment of claims arising after the opening of winding-up proceedings;
 - (g) the rules governing the lodging, verification and admission of claims;
 - (h) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims, and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right in rem or through a set-off;
 - (i) the conditions for and the effects of closure of winding-up proceedings, in particular by composition;
 - (j) creditors' rights after the closure of winding-up proceedings;
 - (k) who is to bear the cost and expenses incurred in the winding-up proceedings;
 - (l) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 10 — Treatment of insurance claims

1. Member States shall ensure that insurance claims take precedence over other claims on the insurance undertaking according to one or both of the following methods:
 - (a) insurance claims shall, with respect to assets representing the technical provisions, take absolute precedence over any other claim on the insurance undertaking;
 - (b) insurance claims shall, with respect to the whole of the insurance undertaking's assets, take precedence over any other claim on the insurance undertaking with the only possible exception of:
 - (i) claims by employees arising from employment contracts and employment relationships,
 - (ii) claims by public bodies on taxes,
 - (iii) claims by social security systems,
 - (iv) claims on assets subject to rights in rem.
2. Without prejudice to paragraph 1, Member States may provide that the whole or a part of the expenses arising from the winding-up procedure, as defined by their national legislation, shall take precedence over insurance claims.
3. Member States which have opted for the method provided for in paragraph 1(a) shall require that insurance undertakings establish and keep up to date a special register in line with the provisions set out in the Annex.

Article 11 — Subrogation to a guarantee scheme

The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 10(1).

Article 12 — Representation of preferential claims by assets

By way of derogation from Article 18 of Directive 73/239/EEC and Article 21 of Directive 79/267/EEC, Member States which apply the method set out in Article 10(1)(b) of this Directive shall require every insurance undertaking to represent, at any moment and independently from a possible winding-up, the claims which may take precedence over insurance claims pursuant to Article 10(1)(b) and which are registered in the insurance undertaking's accounts, by assets mentioned in Article 21 of Directive 92/49/EEC and Article 21 of Directive 92/96/EEC.

Article 13 — Withdrawal of the authorisation

1. Where the opening of winding-up proceedings is decided in respect of an insurance undertaking, the authorisation of the insurance undertaking shall be withdrawn, except to the extent necessary for the purposes of paragraph 2, in accordance with the procedure laid down in Article 22 of Directive 73/239/EEC and Article 26 of Directive 79/267/EEC, if the authorisation has not been previously withdrawn.
2. The withdrawal of authorisation pursuant to paragraph 1 shall not prevent the liquidator or any other person entrusted by the competent authorities from carrying on some of the insurance undertakings' activities in so far as that is necessary or appropriate for the purposes of winding-up. The home Member State may provide that such activities shall be carried on with the consent and under the supervision of the supervisory authorities of the home Member State.

Article 14 — Publication

1. The competent authority, the liquidator or any person appointed for that purpose by the competent authority shall publish the decision to open winding-up proceedings in accordance with the publication procedures provided for in the home Member State and also publish an extract from the winding-up decision in the Official Journal of the European Communities. The supervisory authorities of all the other Member States which have been informed of the decision to open winding-up proceedings in accordance with Article 8(3) may ensure the publication of such decision within their territories in the manner they consider appropriate.
2. The publication of the decision to open winding-up proceedings provided for in paragraph 1 shall also specify the competent authority of the home Member State, the applicable law and the liquidator appointed. It shall be in the official language or in one of the official languages of the Member State in which the information is published.

Article 15 — Information to known creditors

1. When winding-up proceedings are opened, the competent authorities of the home Member State, the liquidator or any person appointed for that purpose by the competent authorities shall without delay individually inform by written notice each known creditor who has his normal place of residence, domicile or head office in another Member State thereof.
2. The notice referred to in paragraph 1 shall in particular deal with time limits, the penalties laid down with regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. The notice shall also indicate whether creditors whose claims are preferential or secured in rem need to lodge their claims. In the case of insurance claims, the notice shall further indicate the general effects of the winding-up proceedings on the insurance contracts, in particular, the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation.

Article 16 — Right to lodge claims

1. Any creditor who has his normal place of residence, domicile or head office in a Member State other than the home Member State, including Member States' public authorities, shall have the right to lodge claims or to submit written observations relating to claims.
2. The claims of all creditors who have their normal place of residence, domicile or head office in a Member State other than the home Member State, including the aforementioned authorities, shall be treated in the same way and accorded the same ranking as claims of an equivalent nature lodgeable by creditors who have their normal place of residence, domicile or head office in the home Member State.

3. Except in cases where the law of the home Member State allows otherwise, a creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and the amount, whether he alleges preference, security in rem or reservation of title in respect of the claim and what assets are covered by his security. The precedence granted to insurance claims by Article 10 need not be indicated.

Article 17 — Languages and form

1. The information in the notice referred to in Article 15 shall be provided in the official language or one of the official languages of the home Member State. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim; time limits to be observed' or, where the law of the home Member State provides for the submission of observations relating to claims, 'Invitation to submit observations relating to a claim; time limits to be observed', in all the official languages of the European Union.

However, where a known creditor is a holder of an insurance claim, the information in the notice referred to in Article 15 shall be provided in the official language or one of the official languages of the Member State in which the creditor has his normal place of residence, domicile or head office.

2. Any creditor who has his normal place of residence, domicile or head office in a Member State other than the home Member State may lodge his claim or submit observations relating to his claim in the official language or one of the official languages of that other Member State.

However, in that event the lodgement of his claim or the submission of observations on his claim, as appropriate, shall bear the heading 'Lodgement of claim' or 'Submission of observations relating to claims', as appropriate, in the official language or one of the official languages of the home Member State.

Article 18 — Regular information to the creditors

1. Liquidators shall keep creditors regularly informed, in an appropriate manner, in particular regarding the progress of the winding-up.
2. The supervisory authorities of the Member States may request information on developments in the winding-up procedure from the supervisory authorities of the home Member State.

TITLE IV PROVISIONS COMMON TO REORGANISATION MEASURES AND WINDING-UP PROCEEDINGS

Article 19 — Effects on certain contracts and rights

By way of derogation from Articles 4 and 9, the effects of the opening of reorganisation measures or of winding-up proceedings on the contracts and rights specified below shall be governed by the following rules:

- (a) employment contracts and employment relationships shall be governed solely by the law of the Member State applicable to the employment contract or employment relationship;
- (b) a contract conferring the right to make use of or acquire immovable property shall be governed solely by the law of the Member State in whose territory the immovable property is situated;
- (c) rights of the insurance undertaking with respect to immovable property, a ship or an aircraft subject to registration in a public register shall be governed by the law of the Member State under whose authority the register is kept.

Article 20 — Third parties' rights in rem

1. The opening of reorganisation measures or winding-up proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the insurance undertaking which are situated within the territory of another Member State at the time of the opening of such measures or proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
 - (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
 - (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
 - (d) a right in rem to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.
 4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 21 — Reservation of title

1. The opening of reorganisation measures or winding-up proceedings against an insurance undertaking purchasing an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of such measures or proceedings the asset is situated within the territory of a Member State other than the State in which such measures or proceedings were opened.
2. The opening of reorganisation measures or winding-up proceedings against an insurance undertaking selling an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of such measures or proceedings the asset sold is situated within the territory of a Member State other than the State in which such measures or proceedings were opened.
3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 22 — Set-off

1. The opening of reorganisation measures or winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the insurance undertaking, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.
2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 23 — Regulated markets

1. Without prejudice to Article 20 the effects of a reorganisation measure or the opening of winding-up proceedings on the rights and obligations of the parties to a regulated market shall be governed solely by the law applicable to that market.
2. Paragraph 1 shall not preclude any action for voidness, voidability, or unenforceability referred to in Article 9(2)(l) which may be taken to set aside payments or transactions under the law applicable to that market.

Article 24 — Detrimental acts

Article 9(2)(l) shall not apply, where a person who has benefited from a legal act detrimental to all the creditors provides proof that:

- (a) the said act is subject to the law of a Member State other than the home Member State, and
- (b) that law does not allow any means of challenging that act in the relevant case.

Article 25 — Protection of third-party purchasers

Where, by an act concluded after the adoption of a reorganisation measure or the opening of winding-up proceedings, an insurance undertaking disposes, for a consideration, of:

- (a) an immovable asset,
- (b) a ship or an aircraft subject to registration in a public register, or

- (c) transferable or other securities whose existence or transfer presupposes entry in a register or account laid down by law or which are placed in a central deposit system governed by the law of a Member State,

the validity of that act shall be governed by the law of the Member State within whose territory the immovable asset is situated or under whose authority the register, account or system is kept.

Article 26 — Lawsuits pending

The effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the insurance undertaking has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.

Article 27 — Administrators and liquidators

1. The administrator's or liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the competent authorities of the home Member State. A translation into the official language or one of the official languages of the Member State within the territory of which the administrator or liquidator wishes to act may be required. No legalisation or other similar formality shall be required.
2. Administrators and liquidators shall be entitled to exercise within the territory of all the Member States all the powers which they are entitled to exercise within the territory of the home Member State. Persons to assist or, where appropriate, represent administrators and liquidators may be appointed, according to the home Member State's legislation, in the course of the reorganisation measure or winding-up proceedings, in particular in host Member States and, specifically, in order to help overcome any difficulties encountered by creditors in the host Member State.
3. In exercising his powers according to the home Member State's legislation, an administrator or liquidator shall comply with the law of the Member States within whose territory he wishes to take action, in particular with regard to procedures for the realisation of assets and the informing of employees. Those powers may not include the use of force or the right to rule on legal proceedings or disputes.

Article 28 — Registration in a public register

1. The administrator, liquidator or any other authority or person duly empowered in the home Member State may request that a reorganisation measure or the decision to open winding-up proceedings be registered in the land register, the trade register and any other public register kept in the other Member States.

However, if a Member State prescribes mandatory registration, the authority or person referred to in subparagraph 1 shall take all the measures necessary to ensure such registration.

2. The costs of registration shall be regarded as costs and expenses incurred in the proceedings.

Article 29 — Professional secrecy

All persons required to receive or divulge information in connection with the procedures of communication laid down in Articles 5, 8 and 30 shall be bound by professional secrecy, in the same manner as laid down in Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EEC, with the exception of any judicial authorities to which existing national provisions apply.

Article 30 — Branches of third country insurance undertakings

1. Notwithstanding the definitions laid down in Article 2(e), (f) and (g) and for the purpose of applying the provisions of this Directive to the reorganisation measures and winding-up proceedings concerning a branch situated in a Member State of an insurance undertaking whose head office is located outside the Community:
 - (a) 'home Member State' means the Member State in which the branch has been granted authorisation according to Article 23 of Directive 73/239/EEC and Article 27 of Directive 79/267/EEC, and
 - (b) 'supervisory authorities' and 'competent authorities' mean such authorities of the Member State in which the branch was authorised.

2. When an insurance undertaking whose head office is outside the Community has branches established in more than one Member State, each branch shall be treated independently with regard to the application of this Directive. The competent authorities and the supervisory authorities of these Member States shall endeavour to coordinate their actions. Any administrators or liquidators shall likewise endeavour to coordinate their actions.

Article 31 — Implementation of this Directive

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 20 April 2003. They shall forthwith inform the Commission thereof. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. National provisions adopted in application of this Directive shall apply only to reorganisation measures or winding-up proceedings adopted or opened after the date referred to in paragraph 1. Reorganisation measures adopted or winding up proceedings opened before that date shall continue to be governed by the law that was applicable to them at the time of adoption or opening.
3. Member States shall communicate to the Commission the text of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 32 — Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 33 — Addressees

This Directive is addressed to the Member States.

Done at Brussels, 19 March 2001.

For the European Parliament — The President N. FONTAINE

For the Council — The President A. LINDH

APPENDIX III: OCFB AND NCFB EXTRACTS

Old Central Fund Byelaw: extracts

Byelaw No. 4 of 1986, 14 July 1986, as amended by Central Fund (Amendment) Byelaw (No. 10 of 1987), Central Fund (Amendment No. 2) Byelaw (No. 9 of 1988), Corporate Members (Consequential Amendments) Byelaw (No. 20 of 1993), New Central Fund Byelaw (No. 23 of 1996), and Amendment Byelaw (No. 9 of 2001).

1. — Interpretation

The provisions of the schedule to this byelaw shall have effect.

2. — Administration of the Central Fund

The Society shall:

- (a) hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the Central Fund;
- (b) levy contributions to the Central Fund in accordance with the provisions of this Byelaw from members of the Society; and
- (c) have such other powers and duties as respects the Central Fund as are conferred or imposed by this byelaw.

3. — Assets of the Central Fund

The Central Fund shall consist of:-

- (a) the assets of the fund constituted by an agreement in writing made on 18 May 1927 (and therein described as "the Central Fund") between the Society and the members of the Society whose names were subscribed thereto;
- (b) contributions to the Central Fund levied pursuant to paragraph 4;
- (c) monies borrowed by the Society pursuant to paragraph 5;
- (d) the investments and other property for the time being representing such fund and contributions;
- (e) income arising from the investments or other assets from time to time constituting the Central Fund;
- (f)
 - (i) recoveries made from members of the Society pursuant to paragraph 10(1)(a) of this byelaw;
 - (ii) recoveries made from members of the Society pursuant to paragraph 10A(5) or (6) of this byelaw and transferred to the Central Fund pursuant to paragraph 10A(9) of this byelaw;
- (g) any other monies or assets which may at any time be added to or accrue to the Central Fund.

...

7. — Application of the Central Fund

Monies out of the Central Fund may be applied and the Central Fund may be charged for any of the following purposes:

- (a) making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's;
- (b) preventing the occurrence or reducing the extent of such default by any member of the Society;
- (c) compensating in whole or in part any person (including the Society) for making for or on behalf of any member of the Society any payment which has the effect of preventing or reducing such default by any such member;
- (d) extinguishing or reducing the liability of any member of the Society to any person whatsoever whether or not arising under a contract of insurance;
- (e) repaying monies previously borrowed for the purposes of this byelaw and paying interest, premium or other charges on such monies;
- (f) any other purpose;

where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

8. — Application of other funds or property of the Society

Monies out of the funds or property of the Society other than the Central Fund may be applied and such funds or property may be charged for any of the following purposes:

- (a) making good any default by any member of the Society under any contract of insurance underwritten at Lloyd's;
- (b) preventing the occurrences or reducing the extent of such default by any member of the Society;
- (c) compensating in whole or in part any person for making for or on behalf of any member of the Society any payment which has had the effect of preventing or reducing such defaults by any such member;
- (d) extinguishing or reducing the liability of any member of the Society to any person whatsoever, whether or not arising under a contract of insurance where in the opinion of the Council it is expedient for the advancement and protection of the interests of the members of the Society in connection with the business carried on by them as such members.

...

New Central Fund Byelaw: extracts

Byelaw No. 23 of 1996, 5 June 1996 as amended by New Central Fund (Amendment) Byelaw (No. 27 of 1996), New Central Fund (Amendment No. 2) Byelaw (No. 35 of 1996), New Central Fund (Amendment No. 3) Byelaw (No. 22 of 1997), New Central Fund (Amendment No. 4) Byelaw (No. 32 of 1997), and Amendment Byelaw (No. 9 of 2001).

...

PART B — CONSTITUTION OF NEW CENTRAL FUND

2. — Establishment of New Central Fund

The Society shall establish, hold, manage and apply in accordance with the provisions of this byelaw a fund to be known as the New Central Fund (in this byelaw "the Fund").

3. — Assets of Fund

The Fund shall consist of

- (a) contributions to the Fund for the time being paid or payable under paragraph 4;

- (b) moneys borrowed by the Society under paragraph 6;
- (c) recoveries for the time being paid or payable to the Society under paragraph 11;
- (d) recoveries made under paragraph 12(l) and transferred to the Fund under paragraph 12(5);
- (e) any other moneys or assets which may from time to time be paid or added to or accrue to the Fund;
- (f) the investments or other property for the time being representing such contributions, moneys or assets;
- (g) income arising from investments or other moneys or assets from time to time constituting the Fund.

...

PART C — APPLICATION OF FUND

8. Application of Fund

- (1) Subject to sub-paragraph (3), moneys or other assets forming part of the Fund may be applied out of the Fund (including application by way of loan or on any other terms as to repayment) for any of the purposes specified in sub-paragraph (2).
- (2) The purposes referred to in sub-paragraph (1) are:
 - (a) directly or indirectly extinguishing or reducing any liability of a member to any person arising out of or in connection with insurance business carried on by that member at Lloyd's;
 - (b) repaying moneys previously borrowed for the purposes of this byelaw and paying interest, premium or other charges on such moneys;
 - (c) repaying contributions made to the Central Fund under paragraph 4(5) of the Central Fund Byelaw in accordance with paragraph 10 of this byelaw;
 - (d) any other purpose (whether or not similar to any purpose mentioned in (a) to (c) above) which may appear to the Council to further any of the objects of the Society.
- (3) Subject to sub-paragraph (4), no moneys or other assets shall be applied out of the Fund:
 - (a) by way of payment (other than a payment on arm's length terms in respect of property, assets, services or other benefits) to any member of the Equitas group; or
 - (b) directly for the purpose of extinguishing or reducing any liability of a member in respect of which Equitas Reinsurance Limited has, under an Equitas reinsurance contract, undertaken to reinsure and indemnify that member.
- (4) Sub-paragraph (3) shall not preclude the Council from applying moneys or assets out of the Fund for any of the purposes mentioned in sub-paragraph (2):
 - (a) in discharge of any legally binding obligation of the Society arising under a contract entered into or other instrument executed at or before the time at which this byelaw comes into force; or
 - (b) in any other case, with the prior sanction of a resolution of the members of the Society in general meeting.
- (5) In this paragraph, except sub-paragraph (4) (b), references to a "member" shall be taken to refer also to former members and to the estates of deceased members of the Society.

...

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